89- 1477

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRUNO AND JOAN FIGLIUZZI,
Petitioners,

v.

CITIBANK, N.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether a banking institution can be both issuer and beneficiary in a standby letter of credit transaction.

Whether a party is liable for attorney fees when a contract containing an attorney fee clause for enforcement and collection upon party's default, and the bulk of the attorney fees were not incurred to collect the sum owed, but incurred as a result of defending a good faith counterclaim.

Whether the bank breached its duty of good faith toward its borrowers.

Whether it was proper for the court to grant summary judgment.

PARTIES BELOW

Parties before the United States Court of Appeals for the Fourth Circuit were Bruno and Joan Figliuzzi as Appellants and Citibank, N.A. as Appellee.

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OPINIONS BELOW

The opinion of the Court of Appeals, not published, appears in the appendix hereto.

The orders of the United States District Court for the Eastern District of Virginia, Alexandria Division, not reported, also appears in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner Bruno and Joan Figliuzzi respectfully pray that this writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 22, 1989. This Court's jurisdiction is pursuant to 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

This is a suit by Citibank, N.A., against Bruno and Joan Figliuzzi to recover on a personal guaranty executed by them on December 22, 1983, as part of an Industrial Revenue Bond transaction.

On a motion by Citibank heard on October 23, 1987, the Court awarded summary judgment in favor of the plaintiff, Citibank, N.A., against the defendants, Bruno and Joan Figliuzzi, jointly and severally for the unpaid balance due on the Note and the fees owed for the issuance of the Letter of Credit, plus enforcement costs, including attorneys' fees, and left the issue of the amount of damages to be tried on November 2, 1987, the date on which the case was to be heard originally.

The Figliuzzis filed for bankruptcy and this matter was stayed and did not come back for hearing until January 3, 1989, at which time the Court heard testimony and argument of counsel, and again heard argument on Friday, January 27, and again on Monday, January 30. The Court entered judgment against the defendants on February 1, 1989, in the total amount of $2,594,997.81, comprising principal in the amount of $1,550,981.22, interest as of January 31, 1989, in the amount of $118,680.88, Letter of Credit fees as of January 31, 1989, in the amount of $234,881.07, and enforcement costs, including attorneys' fees, through December 31, 1988, in the amount of $690,454.64.

Bruno and Joan Figliuzzi appealed from the order granting summary judgment on the liability issues and from the judgment entered against them on February 1, 1989, and from an order denying them a jury trial.

On October 6, 1989, this matter came on for oral argument before the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the lower Court's decision on December 22, 1989.

STATEMENT OF THE FACTS

On December 22, 1983, as part of an Industrial Revenue Bond transaction with LCS Homes, Inc., a corporation wholly owned by Mr. Figliuzzi, Bruno and Joan Figliuzzi signed a personal guaranty which guaranteed the repayment of a secured $6,000,000.00 note. The Industrial Revenue Bond (IRB), also referred to as the Note, was executed by the Industrial Development Authority of Stafford County, Virginia, to Madison National Bank as the lender and LCS Homes, Inc. as the borrower.

As an additional part of the transaction, Citibank simultaneously issued a standby, irrevocable, transferable Letter of Credit in the amount of $6,000,000.00 in favor of Madison National Bank for a fee, payable by LCS Homes, Inc., of 1½% of the unpaid balance on the Note. Also, LCS Homes, Inc., executed a reimbursement agreement that provided for reimbursement to Citibank by LCS Homes, Inc., of any funds paid by Citibank on the Letter of Credit which, inter alia, imposed obligations on Madison in event of default.

At least as early as February 6, 1984, less than two months after settlement on the IRB transaction, federal bank examiners declared the bond a loan and not an investment, that it exceeded Madison's lending limits, and that Madison must divest itself of the bond, and it so advised Citibank.

On March 4, 1985, Citibank purchased the Note from Madison without recourse, but chose to leave Madison as the beneficiary of the Letter of Credit. As of March 4, 1985, LCS Homes, Inc. was not in breach of its loan obligation.

LCS Homes, Inc., claimed that, as a result of Citibank's purchase of the Note, Citibank was no longer entitled to Letter of Credit fees.

LCS Homes, Inc. entered into a contract with a qualified purchaser, John Driggs, comprising three documents,

two dated December 20, 1985, and one, December 22, 1985, to sell to John Driggs the property securing Citibank, and 228 acres, more or less. Two of the provisions were that John Driggs would assume the position of LCS Homes, Inc., and Bruno and Joan Figliuzzi vis-a-vis Citibank, and Bruno and Joan Figliuzzi would be released from their guaranty.

On February 10, 1986, a meeting was held in the offices of the Driggs Corporation attended by Citibank through its representatives, Driggs and his representatives, and Bruno Figliuzzi for LCS Homes, Inc., to determine the conditions upon which Citibank would approve that contract. The negotiations resulted in an agreement between Citibank and Bruno Figliuzzi, and Citibank and Driggs. The agreement between Citibank and Bruno Figliuzzi provided that: (1) Bruno Figliuzzi and Joan Figliuzzi would be released from their guaranty; (2) LCS Homes, Inc. would provide a newly to-be-formed Driggs Company with $1,400,000.00; and (3) Bruno Figliuzzi would give a personal, unsecured shortfall guaranty, to come into play only after the other remedies were exhausted, in the amount of $500,000.00.

Citibank, after the February 10 meeting, reneged on and breached its agreement with Bruno Figliuzzi in that it wanted collateral, and then even more collateral, for the new Figliuzzi $500,000 guaranty; and the form of the consent agreement and proposed new guaranty proffered by Citibank (in April of 1986) to be executed by Bruno and Joan Figliuzzi did not comport with its agreement of February 10, 1986, in that the guaranty and consent agreements, inter alia, were not limited to $500,000.00 nor were they limited to the exhaustion of other remedies.

LCS Homes, Inc. did not make the May through October, 1986, payments on the note and, on November 3, 1986, LCS Homes, Inc., filed for protection under Chapter 11.

Citibank filed this action on December 5, 1986.

Bruno Figliuzzi and Joan Figliuzzi asserted counterclaims and affirmative defenses with respect to, among other things, improper letter of credit fees, bad faith, and failure to draw down on the letter of credit.

REASONS FOR GRANTING THE WRIT

I. WHETHER A BANKING INSTITUTION CAN BE BOTH ISSUER AND BENEFICIARY IN A STANDBY LETTER OF CREDIT TRANSACTION.

In the case at hand, Citibank is both issuing bank and beneficiary and as a result, Citibank has refused to draw down on the letter of credit. In an ordinary letter of credit transaction, the beneficiary would have drawn down on the letter of credit, Citibank, as issuer, would have had the obligation to pay the beneficiary, the letter of credit would have been terminated, and the letter of credit fees would have come to a halt. Even while you are reading this petition, Citibank continues to charge letter of credit fees to Mr. and Mrs. Figliuzzi without their receiving any benefit therefrom.

As issuer and beneficiary, Citibank is contracting with itself and as a result is absurdly asking for payment from itself. How can Citibank contract with itself? Why did Citibank refuse to draw down on the letter of credit? To continue collecting letter of credit fees.

The purpose and value of the standby letter of credit is illustrated in *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386, 398 (D. Md. 1982), in which the court states, "The value of the letter of credit to the beneficiary is the certainty of payment upon compliance with the terms and conditions of the credit." In the case at hand, with Citibank as beneficiary and issuer, the value of the letter of credit is lost in that the beneficiary is not drawing down on the letter of credit. This is further highlighted in *Exxon Company, U.S.A. v. Banque de*

Paris, 828 F.2d 1121, 1122 (5th Cir. 1987), *cert. granted*, 108 S.Ct. 1572 (1988), vacated and remanded on other grounds, 109 S.Ct. 299 (1988), "Standby letters of Credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation." For the market place, standby letters of credit are of vital importance in that they eliminate credit risks, and as a result reduce the cost of commercial transactions.

Another dilemma arises when a bank is both issuer and beneficiary, which is revealed in *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386, 395 (D. Md. 1982), in which the court advises that "Nonpayment by the issuer gives rise to an action by the beneficiary for breach of contract in which the beneficiary must plead and prove due performance on his part." How can Citibank sue itself? It cannot; and, as a result, there is no one to ensure that Citibank performs its part of the bargain. In a standby letter of credit transaction, nobody should be permitted to be both beneficiary and issuer. It will only cause letter of credit transactions to be economically and commercially infeasible. This kind of deception will destroy the utility of the letter of credit in the commercial world in that the customer will eventually realize that banks are taking advantage of them by charging them ongoing letter of credit fees even though one easy step, drawing down on the letter of credit, would stop such charges.

The obligation to drawn down on the standby letter of credit is also addressed in *New Jersey Bank v. Palladino*, 389 A.2d 454, 464 (1978), "It is important to note, that

despite their similarities, the standby letter of credit is not a guarantee. Recovery under a guarantee is predicated upon the primary obligor's nonperformance in face of its guaranteed obligations. The guarantor is therefore only secondarily liable with respect to the same obligation of the primary obligor. Recovery under a standby letter of credit, on the other hand, requires only the presentation of the requisite documents (whether or not the applicant has in fact performed or even may legally perform, its obligations under the underlying agreement), and the issuer is primarily liable with respect to its obligations under the letter of credit (which obligations, needless to say, are different from those of the applicant under the underlying agreement)." Accordingly, the beneficiary had a duty to draw down on the standby letter of credit in order to receive its payment from the issuer who is primarily liable. The issuer is then entitled to payment under the reimbursement agreement, since the issuer is primarily liable and the guarantor only secondarily. As a result, Citibank had an obligation to draw down on the letter of credit, which would stop the letter of credit fees, and then go after the guarantors, if it so wished. It was incorrect to sue the guarantors without first drawing down on the letter of credit and continue to charge the fees. Citibank's practice is against public policy in that the customer continues to pay for letter of credit fees without deriving any benefit therefrom.

In *National Bank of North America v. Alizio*, 103 A.D. 2d 690, 477 N.Y.S. 2d 356 (1st Dept 1984), an institution was both the beneficiary and issuer in the same transaction. The question whether it was proper for this institution to be both issuer and beneficiary never was addressed in that the defendants could not demonstrate that, failing to issue drafts to itself, harmed the defendant's actions. But in the case at hand, Mr. and Mrs. Figliuzzi can illustrate that they were harmed in that they are being forced to continue to pay letter of credit fees even though they do not derive any benefit from it. In *National Bank*

of North America v. Alizio, 103 A.D. 2d 690, 477 N.Y.S. 2d 356 (1st Dept 1984), the bank was both issuer and beneficiary, and no problems arose because, even though it was standing in both shoes, it did what it was supposed to do, draw down on the letter of credit. In the case before this court, Citibank did not fulfill the obligations as it was supposed to do, in that Citibank refused to draw down on the letter of credit. It was not just a technicality to draw down on the letter of credit because Mr. and Mrs. Figliuzzi were continually being charged with letter of credit fees and suffered damages as a result.

The purpose of the standby letter of credit is to assist commercial transaction. Due to the fact that in this case the beneficiary and issuer is the same institution, instead of promoting commercial expediency, it encourages litigation. If banks like Citibank continue to be issuer and beneficiary in the same transaction, the viability of the standby letter of credit will be destroyed. This court needs to provide guidelines and set bounds to ensure that standby letters of credit are preserved. If the standby letter of credit is ill-utilized, as in this case, and litigation is proliferated, standby letters of credit will not be employed in commercial transaction and its effectiveness destroyed.

This position is supported in *East Girard Savings Association v. Citizens National Bank and Trust Company of Baytown*, 593 F.2d 598, 603 (5th Cir. 1979), in which the court supports the notion that the letter of credit be preserved, "The letter of credit is a unique device developed to meet specific needs of the marketplace. If the letter of credit is to retain its utility as a commercial instrument, the rights and duties of the issuer, the beneficiary, and the procurer must remain clear." If this court consents to a practice in which it is permissible for a bank to be both issuer and beneficiary, the whole commercial industry will be disrupted in that a banking institution will stand in two shoes at the same time. The immediate

consequences will be that banks such as Citibank will initiate a common practice of acting both as issuer and beneficiary taking advantage of their customers by charging exurbanite letter of credit fees without providing the certainty of payment bargained for. Customers will refuse to utilize standby letters of credit because they do not want to be taken advantage of, and in turn it will increase the cost of commercial transactions.

A Supreme Court ruling is needed in order to give direction which the Circuits can follow, ensuring uniformity in the law and preserving the integrity of the standby letter of credit, which is of vital importance to the economy. It seems impossible for the issuer and beneficiary to be one and the same entity in that they are at opposite end of the spectrum with different roles to fulfill.

II. WHETHER A PARTY IS LIABLE FOR ATTORNEY FEES WHEN A CONTRACT CONTAINING AN ATTORNEY FEE CLAUSE FOR ENFORCEMENT AND COLLECTION UPON PARTY'S DEFAULT, AND THE BULK OF THE ATTORNEY FEES WERE NOT INCURRED TO COLLECT THE SUM OWED, BUT INCURRED AS A RESULT OF DEFENDING A GOOD FAITH COUNTERCLAIM.

Mr. and Mrs. Figliuzzi entered into a Guaranty in which allegedly Mr. and Mrs. Figliuzzi were liable for all of Citibank's attorney fees. When entering into a contract or guaranty, a party does not expect to be liable for attorney fees in collecting the sum owed plus attorney fees in defending a good faith counterclaim. It seems reasonable that a contract provide for the borrowing party to be liable upon default for the collection efforts of its attorneys, but it seems unreasonable to force the borrowing party to also be liable for attorney fees in defending counterclaims. *Dodson v. Remco Enterprises, Inc.*, 504 F. Supp. 540 (E.D. Va. 1980). This writ of certiorari must be accepted to readdress the issue of attorney fees clarifying whether or not, when a contract gives the bank the

right to be reimbursed for attorney fees with respect to the collection and enforcement of a defaulted note, it is proper to charge attorney fees for the defense of a counterclaim to the borrower. It seems unconscionable to allow a bank to be reimbursed for their expenses and attorney fees with respect to expenses and fees relating to the defense of a good faith counterclaim. Once it is permissible for a party to charge attorney fees defending counterclaims, then individuals would be discouraged from bringing their just claims before a court. It is of vital importance for parties to be able to come forward through the means of the judicial system to correct wrongs. A bank operating in improper ways without that party being ab'e to bring a counterclaim in fear of being charged the bank's attorney fees, is unthinkable, and this judicial system must stop this sort of practice and injustices. The court system is here to prevent injustices, and if access is discouraged, then injustice will continue. The pertinent question is whether Citibank can charge the Mr. and Mrs. Figliuzzi with attorney fees with respect to Citibank defending the counterclaim. I cannot see how. This cannot be considered part of the collection of the Note.

III. WHETHER THE BANK BREACHED ITS DUTY OF GOOD FAITH TOWARD ITS BORROWERS.

The principle of good faith can be addressed either with respect to the law of contract or tort. According to The Restatement (Second) of Contracts in section 205, comment (d) it is pronounced, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement". No real direction has been given by the courts as to how to apply this standard of good faith in commercial transaction in that a question arises whether it is more important to protect the freedom of contract or to protect parties from social injustice when banks utilize its institutional power to further its personal satisfaction. It seems that it is more important to prevent injustice, especially since banks have

become so powerful as to be able to just demand actions and expect the borrower to jump. Lender Liability and Good Faith, 68 Boston University Law Review, May '88, 653-680. This Court should reinforce the common law concept of good faith and stop the diverse decisions around the country. There is disagreement as to how far this good faith doctrine reaches. For example, in *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658, 328 P.2d 198, 200 (1958), in which the court said the following, neither party will "do anything which will injure the right of the other to receive the benefits of the agreement.", in this case having the obligation to draw down on the letter of credit. The situation in this case is similar to that of insurance cases because the borrower expects that the bank will perform pursuant to the terms of the contract. This is exemplified in *K-Mart v. Ponsock*, 732 P.2d 1364 (Nev. 1987) in which the court awarded punitive damages for tortious breach of the covenant of good faith and fair dealing. Just as the employee is dependent upon the employer for a means of survival, and, as a result, expects the employer to act in good faith, the borrower expects the bank to act in good faith with respect to a standby letter of credit, since the borrower is dependent that the standby letter of credit transaction is being fulfilled and executed as it was planned and as the documents reflect.

The bank acted arbitrarily, capriciously and ruthlessly by refusing to draw down on the standby letter of credit only to benefit itself and injure the other party in this case, Mr. and Mrs. Figliuzzi. Banks have developed the attitude that they are so powerful that they are permitted to control and domineer without having to account for their actions. Presently, there are no guidelines concerning the bounds of permissible actions, conduct and practice. In order to ensure that this court system supports fair commercial dealings, contracts and behavior, it is necessary that the United States Supreme Court provide the banking community with bounds as to what is permissible conduct. Public policy demands that law and

the Supreme Courts' decision promote fairness and certainty in commercial lending and banking transactions. A body of coherent principles and rules must be announced by this court and this Writ of Certiorari will initiate the beginning of case law directing commercial practices and transactions. Lenders must be made aware that there are boundaries as to what is permissible in their practices and procedures. *Lender Liability and Good Faith*, 68 Boston University Law Review May '88 653-680, addresses the unreasonable practice of lenders and the necessity of implementing the good faith duty onto the lender to ensure that the lender is forced to act reasonable and fairly. Lenders have become cut throat in enforcing their rights. Sure, in this case it is suggested by Citibank that Mr. Figliuzzi is experienced, but it seems very suspicious to believe that both parties had equal bargaining power because if both parties had equal bargaining power, why did Mr. Figliuzzi execute an all encompassing guaranty, as was executed by him. In addition to demanding Mr. and Mrs. Figliuzzi to execute an all encompassing guaranty, Citibank does not even fulfill its obligation as it contracted to do. How can any court which is fair and which looks out for public policy permit a banking institution to demand its rights under the documents which are in effect but then does not demand of Citibank to perform its obligations under the said documents (i.e. to draw down on the standby Letter of Credit). This Court must ensure that public policy is fair, and, as a result, it is necessary for this court to accept this Writ of Certiorari to ensure fairness in commercial banking transactions. In the article *Lender Liability and Good Faith*, 68 Boston University Law Review May '88 653-680 the following is said; "Under the typical loan agreement, an event of default gives the lender the right to declare the loan immediately due. This right, however, is not absolute; if the lender is not in jeopardy of losing the 'benefit of its contractual bargain,' it may violate the implied obligation of good faith and fair dealing if it demands full repayment of the

loan." *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1375-76, 1380 (9th Cir. 1979), *Sahadi v. Continental Ill. Nat'l Bank & Trust Co.*, 706 F.2d 193, 199 (7th Cir. 1983). In addition, it seems possible that if a lender and borrower are trying to negotiate a settlement then exerts more coercive rights, as was in this case, then the bank may have violated the duty of good faith which it owes to the borrower. This is especially prevalent in this case in that the loan officer involved had, and still has, a personality conflict with the borrower; and, as a result, Citibank's actions were deliberate due to this personality conflict. The purpose was to harm the borrower, which is illustrated by Citibank's failure to draw down on the standby Letter of Credit. The harmfulness of these personality conflicts are expressed in *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 761 (6th Cir. 1985) and *State Nat'l Bank v. Farah Mfg. Co.*, 678 S.W. 2d 661, 686 (Tex. Ct. App. 1984). Citibank should have substituted loan officers to ensure that negotiations of settlement would have been performed in good faith. In addition, there is law which limits the use of unconscionable terms in contracts and controls the abuse of bargaining power by one party over another. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 265 (1969). In the present case, the guaranty is believed to be unconscionable, but if this court decides that the guaranty will stand as being a reasonable document, then this court must demand that in order for Citibank to rely on the terms of the Guaranty, it must perform the obligations it is required to perform and cannot refuse to draw down on the standby Letter of Credit.

It is necessary to construct case law to ensure that fairness is a component of commercial transactions and to ensure that lenders do not harm, especially unjustly as in this case, by continuing to charge the letter of credit charges and the exorbitant attorney fees. Lenders must be held accountable for their actions. In *Lender Liability*

and Good Faith 68 Boston University Law Review May '88 653,670, the lack of a clear standard is questioned and the reasons for setting a policy; "The extension of implied obligation to the lender borrower relationship, however, will actually be an effective deterrent to bank misbehavior and should improve the efficiency with which lenders serve their customers. The doctrine of lender liability has made the banking industry aware that it has a responsibility to treat its customers with fairness."

IV. WHETHER IT WAS PROPER FOR THE COURT TO GRANT SUMMARY JUDGMENT.

The Fourth Circuit was incorrect in affirming the District Court's decision granting summary judgment. In its decision, the Fourth Circuit quotes the following language that summary judgment "should be granted in cases 'where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law,' " but the decision of the Fourth Circuit neglects to finish the quote. The quote is, "but it should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. See *Westinghouse Electric Corp. v. Bulldog Electric Products Co.*, 4 Cir., 179 F.2d 139, 146; *Wexler v. Maryland State Fair*, 4 Cir., 164 F.2d 477. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950).

The Fourth Circuit in its decision quotes language out of *Little Beaver Enterprises v. Humphreys Railways, Inc.*, 719 F.2d 75, 79 (4th Cir. 1983) but neglects to finish the thought of the court. "The trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decisiton will be upheld absent clear error. See *Thompson v. National Railroad Passenger Corp.*, 621 F.2d 814,

823 (6th Cir. 1980). However, the trial court, as a threshold requirement, must expose 'the measure of damages and method of computation,' both to inform the litigants of the basis for its findings and to afford the appellate court 'a possibility of intelligent review." In the case at hand, the District Court did not explain the factors it considered when measuring the amount of attorney fees due to Citibank as reimbursement since it failed to apply the standard and factors considered in *Barber v. Kimbrell's Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) and in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), to decide the amount of attorney fees Citibank was entitled. As a result of this neglect by the District Court, the Fourth Circuit should have disallowed all of the attorney fees and remanded or reduced the attorney fees by applying the factors in those cases. Due to the fact that the Fourth Circuit did not recognize the District Court's neglect in its decision, it is necessary that this court clarify its former decisions addressing attorney fees in the situation as it is presented in this case.

In reviewing the District Court's decision, it is eminently clear that it did not discuss the twelve factors necessary in deciding whether the attorney fees charged by Citibank were reasonable. The court did not follow the guidelines set down by *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.) *cert. denied*, 439 U.S. 934 (1978) and in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and, as a result, the Fourth Circuit was incorrect in upholding the District Court's decision. As stated in *Sun Publishing Company, Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), the only time it is not necessary to do a detailed analysis is when attorney fees are denied. From this language, it is clear that whenever attonrey fees are granted, it is necessary for the Court to provide the defendant with an analysis as to why attorney's fees are granted. This conclusion is supported in *Blue v. Bureau of Prisons*, 570

F.2d 529, 531 (5th Cir. 1978). If this Court does not follow in this logic, then courts would never have the obligation to explain its decision and parties would not recognize what is permissible billing practices. The analysis in awarding attorney fees, the factors in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978) and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), is supported in *Sun Publishing Company, Inc. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), "In *Barber*, this court adopted the reasoning of the Fifth Circuit expressed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), that the twelve factors relevant to the determination of reasonable attorneys' fees should be considered by a district court before it rendered an award of attorneys' fees."

CONCLUSION

Petitioners respectfully submits that this Court should grant the certiorari for the reasons set forth herein.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1430

CITIBANK, N.A.,
Plaintiff-Appellee

versus

BRUNO AND JOAN FIGLIUZZI,
Defendants-Appellants

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
T. S. Ellis, III, District Judge (CA-86-1432-A)

Argued: October 6, 1989 Decided: December 22, 1989

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Joseph F. Manson, III (MACDOWELL & MANSON, P.C.; William T. Ward on brief) for Appellants. Calvin Hayes Cobb, Jr. (Christian R. Bartholomew, STEPTOE & JOHNSON; David J. Mark, SHEARMAN & STERL-

ING; Michael McGettigan, Craig C. Reilly, MURPHY, MCGETTIGAN & WEST, on brief) for Appellee.

PER CURIAM:

Plaintiff brought this diversity suit to enforce the explicit terms of a guaranty agreement. The lower court granted plaintiff's motion for summary judgment, and awarded monetary damages in its favor in the amount of $2,594,997.81. Defendants now appeal this decision, alleging numerous errors by the district court. We are not persuaded by defendants' protestations of error, and accordingly affirm the judgment below.

I.

This action stems from a $6 million Industrial Revenue Bond ("IRB") transmission entered into on December 22, 1983 by the following parties: the Industrial Development Authority of Stafford County, Virginia ("IDA"); Bruno and Joan Figliuzzi (the "Figliuzzis"); LCS Homes, Inc., a Delaware corporation (LCS"); Citibank, N.A. ("Citibank"); and Madison National Bank ("Madison"). IDA is a regional governmental entity. Bruno Figliuzzi, a self-described multi-millionaire, is an experienced real estate developer-investor and businessman. The Figliuzzis, husband and wife, were the sole shareholders of LCS which, prior to its bankruptcy in 1986, was a manufacturer of prefabricated homes. Citibank and Madison are national banking associations, the former based in New York City and the latter in Washington, D.C. This transaction provided LCS with the financing needed to construct a modular home manufacturing plant in Stafford County.

The IRB deal involved the following steps. The Figliuzzis conveyed 27 acres of land on which the plant was to be situated to IDA, which executed a $6 million Industrial Development Revenue Note (the "Note") secured by a

deed of trust (the "Deed") to the conveyed property and a UCC financing statement. IDA then reconveyed the encumbered land to LCS (who assumed the obligation to repay the Note), and assigned the right of repayment under the Note to Madison (who loaned $6 million to LCS). Meanwhile, Citibank issued to Madison a standby, irrevocable, and transferable letter of credit in the face amount of $6 million (the "Letter of Credit") pursuant to a Reimbursement Agreement (the "Reimbursement Agreement") between Citibank and LCS. Contemporaneously, the Figliuzzis entered into an agreement (the "Guaranty") with Citibank and Madison guaranteeing the obligations of LCS to repay any amount drawn under the Letter of Credit, any amount owing under the Reimbursement Agreement, and any amount due and payable under the Note. To comply with federal bank regulations, Madison later sold its interest in the Note to Citibank, who opted to leave Madison as the beneficiary under the Letter of Credit.

The LCS enterprise was largely unsuccessful. The company eventually defaulted on the Note, and filed for protection against creditors under Chapter 11 of the Bankruptcy Code. Citibank, as payee under the Note, accelerated the Note and demanded payment from the Figliuzzis under the terms of the Guaranty. Upon their refusal, Citibank brought this action to enforce repayment. The district court granted plaintiff's motion for summary judgment on the merits of its claim, holding that Citibank was entitled to both the unpaid balance due on the Note, and the outstanding service fees on the Letter of Credit. Shortly thereafter, the Figliuzzis filed their own Chapter 11 bankruptcy petition. A year later, the district court conducted a trial on the issue of damages, and awarded Citibank the amount of $2,594,997.81, consisting of the principal owed, the default (rather than ordinary) interest on the debt, the Letter of Credit service fees, and attorney's fees. This appeal followed.

II.

In summary, the Figliuzzis have made the following assignments of error. First, the Figliuzzis assert that Citibank should have resorted to the Letter of Credit (an LCS obligation) first before seeking repayment under the Guaranty (the Figliuzzis' obligation). Second, they claim that there is a material issue of fact as to whether Citibank acted in bad faith by "essentially," but not actually, accelerating the Note before LCS's actual default. Third, the Figliuzzis maintain that the default interest rate on the Note constitutes an impermissible penalty. Fourth, they argue that because of Citibank's initial allocation of certain payments in accordance with the pre-default terms of the Note, Citibank is now precluded from reallocating the payments between principal and interest figured at the higher default rate, that Citibank implicitly waived its right to impose the default interest rate, and that the Figliuzzis are somehow discharged from their obligations under the Guaranty. Fifth, the Figliuzzis believe that the district court erred in awarding letter of credit fees to Citibank from the time that Madison sold the Note to Citibank. Sixth, they claim that the district court erred in awarding attorney's fees under the Guaranty. Finally, the Figliuzzis assert that the district court erred in granting Citibank's motion to strike the defendants' jury demand.

III.

This court has held that summary judgment should be granted in cases "where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. *See Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950); *Charbonnages De France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). Summary judgments are reviewed *de novo* on appeal. *See Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1162, 1166-67 (4th Cir. 1988).

With respect to the determination of damages, "[t]he trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decision will be upheld absent clear error." *Little Beaver Enterprises v. Humphreys Railways, Inc.*, 719 F.2d 75, 79 (4th Cir. 1983); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 149 (4th Cir. 1987) (also applying the clearly erroneous standard).

IV.

In the present case, we conclude that there are no material questions of fact in dispute, that Citibank was entitled to relief based on the Guaranty, that the Figliuzzis' assertions of error by the district court have no merit, and that the lower court's award of damages was not clearly erroneous. Accordingly, the decision of the court below is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

CITIBANK, N.A.,
Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,
Defendants.

JUDGMENT

Upon consideration of Citibank, N.A.'s claim for damages, the evidence adduced, oral argument by counsel, and for the reasons enunciated by the Court at hearing on January 30, 1989, it is hereby

ORDERED, that Bruno and Joan Figliuzzi are hereby liable for principal in the amount of $1,550,981.22, interest as of January 31, 1989, in the amount of $118,680.88, and letter of credit fees as of January 31, 1989, in the amount of $234,881.07, aggregating $1,904,543.17, and it is hereby further

ORDERED, that Bruno and Joan Figliuzzi are hereby liable for enforcement costs through December 31, 1988, including attorneys' fees in the amount of $690,454.64 in accordance with the following table:

ATTORNEY'S FEES

	Total Incurred	*Allowed*	*Disallowed*
Steptoe & Johnson	$256,078.50	$196,078.50	$ 60,000.00
Shearman & Sterling	367,372.30	352,372.30	15,000.00
Murphy, McGettigan & West	67,387.00	64,187.00	3,200.00
SUBTOTALS	$690,837.80	$612,637.80	$ 78,200.00
EXPENSES			
Steptoe & Johnson			
Travel—local	$ 1,699.20	$ 0	$ 1,699.20
Meals	1,316.06	0	1,316.06
Witnesses	11.125.00	11,125.00	0
Other	32,378.52	32,378.52	0
Shearman & Sterling			
Travel—local	165.00	0	165.00
Travel—U.S.	3,885.70	1,942.85	1,942.85
Overtime, incl. dinners & cabs	4,965.81	0	4,965.81
Multilith & Xerox	39.665.40	19,832.70	19,832.70
Word Processing	7,857.50	0	7,857.50
Proofreaders	2,818.75	0	2,818.75
Meals	308.78	0	308.78
Other	6,514.56	6,514.56	
Murphy, McGettigan & West	6,023.18	6,023.18	0
Subtotals	$113,723.46	$ 77,816.84	$ 40,906.65
TOTALS	$809,561.26	$690,454.64	$119,106.65

Judgment is accordingly entered in favor of Citibank, N.A., against Bruno and Joan Figliuzzi in the amount of $2,594,997.81.

SO ORDERED.

ENTERED this 1st day of February, 1989.

/s/ T.S. Ellis, III
T.S. ELLIS, III
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

CITIBANK, N.A.,
Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,
Defendants.

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the plaintiff to dismiss Count V of the counterclaim is granted, the court concluding that there was no fiduciary duty imposed on the plaintiff either because of its actions in this matter or because it simultaneously was the holder of the note and the holder of the letter of credit which it had issued and which secures the note.

2. The motion of the plaintiff to dismiss Count VI of the counterclaim is granted, the court concluding that the acts of the plaintiff in withholding its unconditional consent to the sale of property to Driggs could not be tortious interference since the plaintiff had the right to withhold such unconditional consent, and its failure to perform any understanding reached with the defendants was not a tortious interference with the contract with Driggs.

3. The motion of the plaintiff to dismiss Count VII of the counterclaim is granted, the court concluding that

neither the alleged pressure by the plaintiff on the defendants to sell the property, its withholding of unconditional consent to the transfer of the property, the refusal to agree to the purchase of the note by a bank friendly to the defendants, nor any other activities of the plaintiff constitute a breach of any implied duty of good faith owed the defendants.

4. The motion to plaintiff to dismiss Count VIII of the counterclaim is granted, the court concluding that there was no merging of the note and the letter of credit and no extinguishment of the obligation to pay the fees for the letter of credit, when the letter of credit and the note both became the property of the plaintiff.

5. The affirmative defenses are stricken, counsel for the defendants conceding that all affirmative defenses except Nos. 9 and 14 are subsumed in the rulings on the motions to dismiss the counterclaims. Nos. 9 and 14, which raise the question whether the plaintiff should assert these claims against the principal before resorting to the guarantors, are answered by the bankruptcy of the principal.

6. Summary judgment is awarded in favor of the plaintiff Citibank, N.A., against the defendants Bruno Figliuzzi and Joan Figliuzzi, jointly and severally, for the unpaid balance due on the note and the fees owed for the issuance of the letter of credit, plus enforcement costs, including attorney's fees. The issue of the amount of damages shall be tried on November 2, 1987, unless the parties in the meantime can agree on those damages.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 23rd, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

N.A. CITIBANK,

Plaintiff,

v.

BRUNO FIGLIUZZI, *et al.*,

Defendants.

ORDER

For the reasons stated from the bench, the court finding that the plaintiff has established that the defendants' waiver of trial by jury was informed and voluntary, it is hereby

ORDERED that the motion of the plaintiff to strike the defendants' demand for trial by jury is granted.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 9th, 1987

No. 89-1477

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BRUNO AND JOAN FIGLIUZZI,
Petitioners,

v.

CITIBANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT CITIBANK, N.A.

CALVIN H. COBB, JR.
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April 25, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

RULE 29.1 DISCLOSURE

Citibank, N.A. is a wholly-owned subsidiary of Citicorp. The following is a list of its subsidiaries (except wholly-owned subsidiaries):

Banco de Honduras S.A.

Citiach, Inc.

Citibank-Maghreb

Citibank (Zaire) S.A.R.L.

Citytrust Banking Corporation

Dragnet Developments Limited

Dunfermline Enterprises Limited

Groupement d'Interet Economique "Paris Citicorp Center"

International Bank Limited

Maghreb Finance S.A.

Saudi American Bank

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1477

BRUNO AND JOAN FIGLIUZZI,
Petitioners,

v.

CITIBANK, N.A.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT CITIBANK, N.A.

Respondent Citibank, N.A. ("Citibank") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit in this case and award respondent appropriate relief under Rule 42.2 of the Rules of this Court.

The unpublished disposition of the court of appeals, noted at 892 F.2d 1041 (4th Cir. 1989) (table), is reproduced in the Appendix to the Petition ("Pet.") at pages 1a to 5a. The orders of the district court appear in the Appendix to the Petition at pages 6a to 12a. However, the district court's oral opinions, findings of fact, and conclusions of law underlying those orders were omitted from the Appendix to the Petition, in violation of Rule 14.1(k) of the Rules of this Court. Accordingly, the transcript excerpts containing those opinions, findings,

and conclusions, as well as excerpts from the argument of counsel revealing petitioners' counsel's dispositive concessions on points nevertheless raised in the Petition, are reproduced in the Appendix to this Brief in Opposition.[1]

COUNTERSTATEMENT

This diversity case involves Citibank's efforts to collect on a guaranty agreement governed by New York law and presents no federal question. This action stems from a $6 million Industrial Revenue Bond ("IRB") transaction entered into in 1983 to provide financing for the construction of a modular home manufacturing plant by LCS Homes, Inc. ("LCS") in Stafford County, Virginia. LCS is wholly-owned by petitioner Bruno Figliuzzi, an experienced businessman and self-described multimillionaire. As part of the IRB transaction, Madison National Bank ("Madison") furnished $6 million in exchange for an Industrial Development Revenue Note (the "Note"), which LCS promised to repay. Pet. at 2a-3a. The interest rate on the Note was three-quarters of Madison's prime rate, to be increased to Madison's prime rate plus two percent in the event of default.[2]

Interest on the Note represented Madison's compensation for the use of its money only. The entire risk of loss was upon Citibank, which issued to Madison an irrevocable, transferable standby letter of credit ("Letter of Credit") in the face amount of $6 million pursuant to a Reimbursement Agreement between Citibank and LCS. Pet. at 3a. Under the Reimbursement Agreement, LCS agreed to pay Citibank quarterly Letter of Credit

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[1] The Appendix contains an exact reproduction of the transcript excerpts, including the errors appearing therein. Errors carried over from the transcripts have not been individually identified with a "[sic]" notation.

[2] Note at 2, 5. The Note appears at Tab 10 of the Joint Appendix submitted to the court of appeals (hereinafter cited as Joint Appendix Tab ——).

fees calculated as a percentage of the unadvanced portion of the Letter of Credit amount.[3] In the event of LCS's default on the Note, Madison was entitled to draw under the credit and was thus fully secured in the transaction.[4] The Letter of Credit fees represented Citibank's compensation for assuming all of the risk of the transaction.

Contemporaneously, the Figliuzzis entered into an agreement (the "Guaranty") with iCtibank and Madison unconditionally guaranteeing all of the obligations of LCS in the IRB transaction, including repayment of any amount drawn under the Letter of Credit, any amount owing under the Reimbursement Agreement, and any amount due and payable under the Note.[5] The Guaranty expressly permitted the banks to proceed directly against the Figliuzzis without first exhausting the banks' remedies against LCS.[6] The Figliuzzis also agreed to "pay any and all costs and expenses incurred by the Banks . . . in connection with . . . the enforcement and protection of the rights and interests of the Banks hereunder and under applicable law." [7]

To comply with federal bank regulations, Madison later sold its interest in the Note to Citibank. Pet. at 3a. Upon learning of the transfer of the Note from Madison to Citibank, LCS ceased paying Letter of Credit fees. *Id.* at 3. LCS later defaulted on the Note as well and filed for protection against creditors under Chapter

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[3] Reimbursement Agreement § 2.04, Joint Appendix Tab 14.

[4] Letter of Credit at 2, Joint Appendix Tab 12. The Letter of Credit required Madison to take certain actions as preconditions to Citibank's obligation to honor the credit. *Id.* Presumably, these are the "obligations" imposed "on Madison in the event of default" to which petitioners refer. Pet. at 3.

[5] Guaranty § 2.01, Joint Appendix Tab 11.

[6] *Id.* § 2.03.

[7] *Id.* § 7.02.

11 of the Bankruptcy Code. Citibank meanwhile had accelerated the Note and demanded payment from the Figliuzzis under the Guaranty. Upon their refusal, Citibank brought this action to enforce repayment. *Id.* at 3a. The Figliuzzis responded with an answer asserting twenty affirmative defenses and a counterclaim in eight counts based on various theories included in their affirmative defenses.[8] The Figliuzzis later dismissed twelve of their affirmative defenses and four counts of the counterclaim.[9]

Following briefing and oral argument, the district court granted Citibank's motion for summary judgment on the merits of its claim, holding that Citibank was entitled to the unpaid balance due on the Note, the outstanding Letter of Credit fees, and "enforcement costs, including attorney's fees." Pet. at 11a. At the same time, the district court dismissed the Figliuzzis' counterclaim, concluding that Citibank's actions as alleged by the Figliuzzis were "no more than under the circumstances [Citibank] was entitled to do." App. at 4a.[10] The affirmative defenses that mirrored the counterclaim fell with the counterclaim. *Id.* at 5a. The court retained the original trial date for a determination of the precise amount of Citibank's judgment. *Id.*

On that trial date, however, the Figliuzzis filed their own Chapter 11 bankruptcy petition, and this matter was stayed. *Id.* at 30a. More than a year later, the dis-

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[8] Answer and Counterclaim, Joint Appendix Tab 3.

[9] Stipulation, Joint Appendix Tab 6.

[10] Petitioners' discussion of a transaction with one Driggs, Pet. at 3-4, is misleading, as well as irrelevant, because they did not plead a claim against Citibank for breach of contract in connection with that transaction. Rather, petitioners complained before the district court that Citibank's failure to approve the Driggs sale constituted breach of an implied duty. Counterclaim ¶¶ 110, 111, Joint Appendix Tab 3.

trict court conducted a trial on the issue of damages and awarded Citibank the amount of $2,594,997.81, consisting of principal, interest at the default rate provided for in the Note, Letter of Credit fees, and attorneys' fees. Pet. at 6a. The district court made extensive findings in support of its opinion, which it rendered from the bench. *See* App. 9a-40a.

Petitioners appealed several of the district court's rulings to the United States Court of Appeals for the Fourth Circuit. That court, after stating the appropriate standards for review of summary judgment and damages rulings, concluded that "there are no material questions of fact in dispute, that Citibank was entitled to relief based on the Guaranty, that the Figliuzzis' assertions of error by the district court have no merit, and that the lower court's award of damages was not clearly erroneous." Pet. at 5a. Accordingly, the court of appeals affirmed the lower court's rulings in all respects. *Id.* The court of appeals did not cause its decision to be published.[11]

REASONS FOR DENYING THE WRIT

Petitioners essentially ask this Court to review the decisions of the two courts below upholding Citibank's entitlement to Letter of Credit fees and to scrutinize the amount of enforcement costs and expenses approved by those courts under the Guaranty.[12] Because neither of those matters involves any aspect of federal law and because the lower courts' handling of this case presents no

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[11] Under the court's rules, citation of its unpublished dispositions is disfavored except in specified circumstances. *See* 4th Cir. I.O.P. 36.5, *reprinted in* 28 U.S.C.A. rules pt. 1, at 417 (West 1989).

[12] The title of section IV of the Petition, "Whether it was Proper for the Court to Grant Summary Judgment," is misleading. As discussed below, that section presents no challenge to the courts' application of Fed. R. Civ. P. 56. *See infra* pp. 9-10.

occasion for the exercise of this Court's power of supervision, the Petition should be denied.[13]

I. THE SUBSTANTIVE ISSUES RAISED IN THE PETITION ARE GOVERNED BY STATE LAW

The Petition is based upon a fundamental misperception of the role of federal courts sitting in diversity. Petitioners cast this Court as supreme lawgiver, with the power to define and dictate to the courts of the nation the true tenets of general commercial law.[14] But the era of *Swift v. Tyson*[15] has long since passed, and federal diversity cases are no longer governed by the common law as a "brooding omnipresence in the sky."[16] Rather, the task of federal courts sitting in diversity is to ascertain and apply the appropriate state law.[17]

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[13] *See* Sup. Ct. R. 10.1.

[14] For example, Petitioners assert, "A body of coherent principles and rules [governing commercial lending] must be announced by this [C]ourt." Pet. at 12. *See also, e.g.*, Pet. at 8 ("This [C]ourt needs to provide guidelines and set bounds to ensure that standby letters of credit are preserved."); *id.* at 12 ("This Court must ensure that public policy is fair, and, as a result, it is necessary for this [C]ourt to accept this Writ of Certiorari to ensure fairness in commercial banking transactions").

[15] 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[16] *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[17] *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *see* 28 U.S.C. § 1652 (1982) (Rules of Decision Act). Federal courts are not empowered to create common law in diversity cases, for "[t]here is no federal general common law." *Erie R.R.*, 304 U.S. at 78. *See also id.* (neither Congress nor the federal courts has the power "to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts").

In this diversity case, the district court was called upon to determine the rights and obligations of the parties under a number of contracts. The choice of law provisions in those contracts directed the court to New York and Virginia law.[18] The district court gave effect to those provisions and properly applied the governing state law. App. at 35a.[19] There is, therefore, no issue of federal law for this Court to reach.

Petitioners effectively concede as much. Nowhere in their arguments relating to the district court's award of Letter of Credit fees do petitioners challenge the lower courts' rulings as contrary to applicable state law. *See* Pet. §§ I & III.[20] Thus, although petitioners cite various

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[18] The Guaranty and the Reimbursement Agreement are governed by the law of New York, the Note by the law of Virginia, and the Letter of Credit by the Uniform Customs and Practice for Documentary Credits and New York law. Guaranty § 7.05, Joint Appendix Tab 11; Reimbursement Agreement § 8.07, Joint Appendix Tab 14; Note at 6, Joint Appendix Tab 10; Letter of Credit at 3, Joint Appendix Tab 12.

[19] Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), a federal court sitting in diversity is to follow the choice of law rules of the state in which it sits. Virginia courts recognize and effectuate choice of law provisions in contracts. *See, e.g., Gordonville Indus. v. American Artos Corp.*, 549 F. Supp. 200, 204-05 (W.D. Va. 1982); *Union Century Life Ins. Co. v. Pollard*, 94 Va. 146, 151-52, 26 S.E. 421, 421-22 (1896).

[20] Several of petitioners' current arguments respecting their liability for Letter of Credit fees either were not raised at the appropriate stage of the proceedings below or were expressly abandoned prior to judgment on the merits. Citibank's purported "obligation to draw down on the letter of credit," which lies at the heart of petitioners' arguments on this issue, was articulated for the first time more than a year after petiitoners' liability for Letter of Credit fees had been established—in petitioners' trial brief submitted in connection with the trial on damages. Petitioners' argument that Citibank's activities vis-a-vis LCS were attributable to a personality conflict between Mr. Figliuzzi and Citibank's loan officer, Pet. at 13, was raised for the first time in the Petition, while the claim that the Guaranty is unconscionable, *id.*, was as-

inapposite state and federal court decisions from around the country extolling the virtues of standby letters of credit or applying a good faith standard to contractual relations, they cite no appellate cases from New York or Virginia even arguably in conflict with any of the rulings below.[21] Instead, petitioners repeatedly ask this Court to fashion new rules, implicitly conceding that this case was correctly decided under existing state law.[22]

Moreover, contrary to petitioners' implication in their attorneys' fees argument, *see* Pet. at 14-16, this case did not involve a federal fee-shifting statute. The district court simply enforced the petitioners' contractual obligation to reimburse Citibank for costs and expenses incurred in enforcing its rights under the Guaranty. *See* App. at 35a-36a.

In sum, this case involves nothing more than the unremarkable occasion of a district court correctly applying the *Erie* doctrine in a diversity case. For that reason alone, the Petition should be denied.

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serted as an affirmative defense that was later voluntarily dismissed with prejudice. Stipulation at 1, Joint Appendix Tab 6.

[21] Petitioners' discussion of *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978), is misleading. Pet. at 6-7. The quoted passage appears in the dissent and is itself a quotation from a law review article. 77 N.J. at 53, 389 A.2d at 464 (Conford, J., dissenting) (quoting Arnold & Bransilver, *The Standing Letter of Credit—The Controversy Continues*, 10 U.C.C. L.J. 272, 279-80 (1978)). Moreover, the case involved determining whether a particular agreement was properly characterized as a standby letter of credit, rather than as a guaranty. It contains no discussion of any "obligation to draw down on the standby letter of credit." Pet. at 6.

[22] *See* Pet. at 8-9, 10-14.

II. THE LOWER COURTS' CONDUCT OF THESE PROCEEDINGS WAS PROPER

Not only were the substantive issues governed by state law, but there was nothing untoward about the conduct of the proceedings below. Petitioners' liability for the various components of the damages ultimately awarded, including Letter of Credit and attorneys' fees, was established on summary judgment after briefing and oral argument. There was no dispute that petitioners had executed the agreement guaranteeing LCS's obligations or that LCS was in default. Petitioners did dispute LCS's liability for Letter of Credit fees following transfer of the Note to Citibank, but the district court reasonably concluded that, because the risk of the transaction remained with Citibank irrespective of which bank held the Note, LCS's obligation to compensate Citibank for assuming that risk survived transfer of the Note. App. at 5a.[23] As to petitioners' various defenses and counterclaims, the district court properly concluded that, as a matter of law and assuming the truth of their factual allegations, those circumstances neither excused petitioners' performance under the Guaranty nor supported a cause of action against Citibank. App. at 4a-5a. The district court's decision was upheld by the court of appeals. Pet. at 5a.

Although petitioners purport in section IV of the Petition to attack the grant of summary judgment, nowhere

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[23] In arriving at this conclusion, the district court simply recognized the economic realities of the IRB transaction. In the normal lending arrangement, interest on the debt constitutes the lender's compensation for both the rental value of the money and for assuming the risk of nonpayment. In this transaction, however, Madison provided the money while Citibank assumed the risk of nonpayment, with the result that lender compensation was split into two streams—interest to Madison and Letter of Credit fees to Citibank. To say that upon acquiring the Note Citibank was no longer entitled to Letter of Credit fees is to say that Citibank no longer bore the risk of nonpayment, an insupportable conclusion.

do they assert that either the district court or the court of appeals misapplied Rule 56 of the Federal Rules of Civil Procedure. Rather, they merely assert without discussion that the court of appeals failed to quote properly from its earlier opinions. Pet. at 14.

Petitioners' challenge to the district court's handling of the attorneys' fees issue (section IV of the Petition) is similarly groundless. There, petitioners essentially ask this Court to correct the district court's asserted error of failing to scrutinize Citibank's claim for attorneys' fees under the standards developed in and applicable to fee awards under federal fee-shifting statutes. This argument is specious for a number of reasons.

First, petitioners are contractually obligated to pay Citibank's attorneys' fees in this case. Since no federal fee-shifting statute is involved, Citibank's entitlement to attorneys' fees is simply a matter of interpretation of a contract governed by New York law. Therefore, none of the cases relied upon by petitioners controls.[24]

Second, the district court's approach was correct. The court implied a reasonableness standard into the contract and then enforced the contract as so modified. App. at 20a-21a, 35a-36a (relying upon *United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, 834 F.2d 1533, 1547-48 (10th Cir. 1987)).[25] The court then looked to the federal statutory cases to inform its application of the reasonableness standard and

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[24] *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978), involved the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), involved Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); and *Sun Publishing Co. v. Mecklenburg News, Inc.*, 823 F.2d 818, 819 (4th Cir. 1987), involved the Clayton Act, 15 U.S.C. § 15(a).

[25] *Accord Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 521, 381 N.Y.S.2d 459, 463, 344 N.E.2d 391, 395 (1976).

ruled on every category of fees and expenses that petitioners challenged. App. at 36a; *id.* at 9a-20a.[26] The factors applied were the very ones upon which New York courts rely in evaluating contractual awards of attorneys fees.[27] The court's analysis was all the more appropriate in view of the fact that petitioners' counsel had specifically conceded that Citibank's counsel's hourly rates were reasonable. App. at 8a.[28]

Finally, the district court's inquiry in passing on the reasonableness of requested attorneys' fees is essentially factual.[29] In this case, the district court's decision was upheld by the court of appeals. As this Court has repeatedly stated, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and

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[26] The court's final rulings on the various categories are reflected in its judgment. *See* Pet. at 7a.

[27] *Compare* App. at 36a *with F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir. 1987) (applying New York law and citing *In re Estate of Schaich*, 55 A.D.2d 914, 914, 391 N.Y.S.2d 135, 136, *appeal dismissed*, 42 N.Y.2d 802, 397 N.Y.S.2d 1026, 366 N.E.2d 293 (1977)).

[28] Petitioners argue in section II of the Petition that fees should not have been allowed with respect to Citibank's defense against petitioners' counterclaims. Petitioners' counterclaims, however, were based on the same factual allegations as their affirmative defenses. *See* App. at 5a. Thus, Citibank's attorneys' fees incurred defending against the counterclaims were inseparable from those incurred pursuing the main claim. The district court rejected petitioners' assertion that work attributable to the breach of good faith counterclaim was not part of enforcement of the Guaranty. App. at 10a. Moreover, petitioners' counsel, Joseph F. Manson III, expressly conceded before the district court that the lender liability claims were properly "construed by this Court as part of enforcement." App. at 9a.

[29] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

exceptional showing of error." [30] Petitioners can show no such "obvious and exceptional" error here.

In sum, the lower courts' conduct of these proceedings was entirely proper and presents no occasion for the exercise of this Court's power of supervision.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 25, 1990

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[30] *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (citations omitted); *accord, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

N. A. CITIBANK,

Plaintiff,

vs

BRUNO FIGLIUZZI, *et al.*,

Defendant.

Friday, October 9, 1987

Alexandria, Virginia

Transcript of Plaintiff's Motion to Strike Defendant's Demand for Jury Trial in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

For the Plaintiff:

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* * * *

11 of the Bankruptcy Code. Citibank meanwhile had accelerated the Note and demanded payment from the Figliuzzis under the Guaranty. Upon their refusal, Citibank brought this action to enforce repayment. *Id.* at 3a. The Figliuzzis responded with an answer asserting twenty affirmative defenses and a counterclaim in eight counts based on various theories included in their affirmative defenses.[8] The Figliuzzis later dismissed twelve of their affirmative defenses and four counts of the counterclaim.[9]

Following briefing and oral argument, the district court granted Citibank's motion for summary judgment on the merits of its claim, holding that Citibank was entitled to the unpaid balance due on the Note, the outstanding Letter of Credit fees, and "enforcement costs, including attorney's fees." Pet. at 11a. At the same time, the district court dismissed the Figliuzzis' counterclaim, concluding that Citibank's actions as alleged by the Figliuzzis were "no more than under the circumstances [Citibank] was entitled to do." App. at 4a.[10] The affirmative defenses that mirrored the counterclaim fell with the counterclaim. *Id.* at 5a. The court retained the original trial date for a determination of the precise amount of Citibank's judgment. *Id.*

On that trial date, however, the Figliuzzis filed their own Chapter 11 bankruptcy petition, and this matter was stayed. *Id.* at 30a. More than a year later, the dis-

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[8] Answer and Counterclaim, Joint Appendix Tab 3.

[9] Stipulation, Joint Appendix Tab 6.

[10] Petitioners' discussion of a transaction with one Driggs, Pet. at 3-4, is misleading, as well as irrelevant, because they did not plead a claim against Citibank for breach of contract in connection with that transaction. Rather, petitioners complained before the district court that Citibank's failure to approve the Driggs sale constituted breach of an implied duty. Counterclaim ¶¶ 110, 111, Joint Appendix Tab 3.

trict court conducted a trial on the issue of damages and awarded Citibank the amount of $2,594,997.81, consisting of principal, interest at the default rate provided for in the Note, Letter of Credit fees, and attorneys' fees. Pet. at 6a. The district court made extensive findings in support of its opinion, which it rendered from the bench. *See* App. 9a-40a.

Petitioners appealed several of the district court's rulings to the United States Court of Appeals for the Fourth Circuit. That court, after stating the appropriate standards for review of summary judgment and damages rulings, concluded that "there are no material questions of fact in dispute, that Citibank was entitled to relief based on the Guaranty, that the Figliuzzis' assertions of error by the district court have no merit, and that the lower court's award of damages was not clearly erroneous." Pet. at 5a. Accordingly, the court of appeals affirmed the lower court's rulings in all respects. *Id.* The court of appeals did not cause its decision to be published.[11]

REASONS FOR DENYING THE WRIT

Petitioners essentially ask this Court to review the decisions of the two courts below upholding Citibank's entitlement to Letter of Credit fees and to scrutinize the amount of enforcement costs and expenses approved by those courts under the Guaranty.[12] Because neither of those matters involves any aspect of federal law and because the lower courts' handling of this case presents no

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[11] Under the court's rules, citation of its unpublished dispositions is disfavored except in specified circumstances. *See* 4th Cir. I.O.P. 36.5, *reprinted in* 28 U.S.C.A. rules pt. 1, at 417 (West 1989).

[12] The title of section IV of the Petition, "Whether it was Proper for the Court to Grant Summary Judgment," is misleading. As discussed below, that section presents no challenge to the courts' application of Fed. R. Civ. P. 56. *See infra* pp. 9-10.

occasion for the exercise of this Court's power of supervision, the Petition should be denied.[13]

I. THE SUBSTANTIVE ISSUES RAISED IN THE PETITION ARE GOVERNED BY STATE LAW

The Petition is based upon a fundamental misperception of the role of federal courts sitting in diversity. Petitioners cast this Court as supreme lawgiver, with the power to define and dictate to the courts of the nation the true tenets of general commercial law.[14] But the era of *Swift v. Tyson*[15] has long since passed, and federal diversity cases are no longer governed by the common law as a "brooding omnipresence in the sky."[16] Rather, the task of federal courts sitting in diversity is to ascertain and apply the appropriate state law.[17]

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[13] *See* Sup. Ct. R. 10.1.

[14] For example, Petitioners assert, "A body of coherent principles and rules [governing commercial lending] must be announced by this [C]ourt." Pet. at 12. *See also, e.g.*, Pet. at 8 ("This [C]ourt needs to provide guidelines and set bounds to ensure that standby letters of credit are preserved."); *id.* at 12 ("This Court must ensure that public policy is fair, and, as a result, it is necessary for this [C]ourt to accept this Writ of Certiorari to ensure fairness in commercial banking transactions").

[15] 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[16] *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[17] *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *see* 28 U.S.C. § 1652 (1982) (Rules of Decision Act). Federal courts are not empowered to create common law in diversity cases, for "[t]here is no federal general common law." *Erie R.R.*, 304 U.S. at 78. *See also id.* (neither Congress nor the federal courts has the power "to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts").

In this diversity case, the district court was called upon to determine the rights and obligations of the parties under a number of contracts. The choice of law provisions in those contracts directed the court to New York and Virginia law.[18] The district court gave effect to those provisions and properly applied the governing state law. App. at 35a.[19] There is, therefore, no issue of federal law for this Court to reach.

Petitioners effectively concede as much. Nowhere in their arguments relating to the district court's award of Letter of Credit fees do petitioners challenge the lower courts' rulings as contrary to applicable state law. *See* Pet. §§ I & III.[20] Thus, although petitioners cite various

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[18] The Guaranty and the Reimbursement Agreement are governed by the law of New York, the Note by the law of Virginia, and the Letter of Credit by the Uniform Customs and Practice for Documentary Credits and New York law. Guaranty § 7.05, Joint Appendix Tab 11; Reimbursement Agreement § 8.07, Joint Appendix Tab 14; Note at 6, Joint Appendix Tab 10; Letter of Credit at 3, Joint Appendix Tab 12.

[19] Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), a federal court sitting in diversity is to follow the choice of law rules of the state in which it sits. Virginia courts recognize and effectuate choice of law provisions in contracts. *See, e.g., Gordonville Indus. v. American Artos Corp.*, 549 F. Supp. 200, 204-05 (W.D. Va. 1982); *Union Century Life Ins. Co. v. Pollard*, 94 Va. 146, 151-52, 26 S.E. 421, 421-22 (1896).

[20] Several of petitioners' current arguments respecting their liability for Letter of Credit fees either were not raised at the appropriate stage of the proceedings below or were expressly abandoned prior to judgment on the merits. Citibank's purported "obligation to draw down on the letter of credit," which lies at the heart of petitioners' arguments on this issue, was articulated for the first time more than a year after petitioners' liability for Letter of Credit fees had been established—in petitioners' trial brief submitted in connection with the trial on damages. Petitioners' argument that Citibank's activities vis-a-vis LCS were attributable to a personality conflict between Mr. Figliuzzi and Citibank's loan officer, Pet. at 13, was raised for the first time in the Petition, while the claim that the Guaranty is unconscionable, *id.*, was as-

inapposite state and federal court decisions from around the country extolling the virtues of standby letters of credit or applying a good faith standard to contractual relations, they cite no appellate cases from New York or Virginia even arguably in conflict with any of the rulings below.[21] Instead, petitioners repeatedly ask this Court to fashion new rules, implicitly conceding that this case was correctly decided under existing state law.[22]

Moreover, contrary to petitioners' implication in their attorneys' fees argument, *see* Pet. at 14-16, this case did not involve a federal fee-shifting statute. The district court simply enforced the petitioners' contractual obligation to reimburse Citibank for costs and expenses incurred in enforcing its rights under the Guaranty. *See* App. at 35a-36a.

In sum, this case involves nothing more than the unremarkable occasion of a district court correctly applying the *Erie* doctrine in a diversity case. For that reason alone, the Petition should be denied.

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serted as an affirmative defense that was later voluntarily dismissed with prejudice. Stipulation at 1, Joint Appendix Tab 6.

[21] Petitioners' discussion of *New Jersey Bank v. Palladino*, 77 N.J. 33, 389 A.2d 454 (1978), is misleading. Pet. at 6-7. The quoted passage appears in the dissent and is itself a quotation from a law review article. 77 N.J. at 53, 389 A.2d at 464 (Conford, J., dissenting) (quoting Arnold & Bransilver, *The Standing Letter of Credit—The Controversy Continues*, 10 U.C.C. L.J. 272, 279-80 (1978)). Moreover, the case involved determining whether a particular agreement was properly characterized as a standby letter of credit, rather than as a guaranty. It contains no discussion of any "obligation to draw down on the standby letter of credit." Pet. at 6.

[22] *See* Pet. at 8-9, 10-14.

II. THE LOWER COURTS' CONDUCT OF THESE PROCEEDINGS WAS PROPER

Not only were the substantive issues governed by state law, but there was nothing untoward about the conduct of the proceedings below. Petitioners' liability for the various components of the damages ultimately awarded, including Letter of Credit and attorneys' fees, was established on summary judgment after briefing and oral argument. There was no dispute that petitioners had executed the agreement guaranteeing LCS's obligations or that LCS was in default. Petitioners did dispute LCS's liability for Letter of Credit fees following transfer of the Note to Citibank, but the district court reasonably concluded that, because the risk of the transaction remained with Citibank irrespective of which bank held the Note, LCS's obligation to compensate Citibank for assuming that risk survived transfer of the Note. App. at 5a.[23] As to petitioners' various defenses and counterclaims, the district court properly concluded that, as a matter of law and assuming the truth of their factual allegations, those circumstances neither excused petitioners' performance under the Guaranty nor supported a cause of action against Citibank. App. at 4a-5a. The district court's decision was upheld by the court of appeals. Pet. at 5a.

Although petitioners purport in section IV of the Petition to attack the grant of summary judgment, nowhere

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[23] In arriving at this conclusion, the district court simply recognized the economic realities of the IRB transaction. In the normal lending arrangement, interest on the debt constitutes the lender's compensation for both the rental value of the money and for assuming the risk of nonpayment. In this transaction, however, Madison provided the money while Citibank assumed the risk of nonpayment, with the result that lender compensation was split into two streams—interest to Madison and Letter of Credit fees to Citibank. To say that upon acquiring the Note Citibank was no longer entitled to Letter of Credit fees is to say that Citibank no longer bore the risk of nonpayment, an insupportable conclusion.

do they assert that either the district court or the court of appeals misapplied Rule 56 of the Federal Rules of Civil Procedure. Rather, they merely assert without discussion that the court of appeals failed to quote properly from its earlier opinions. Pet. at 14.

Petitioners' challenge to the district court's handling of the attorneys' fees issue (section IV of the Petition) is similarly groundless. There, petitioners essentially ask this Court to correct the district court's asserted error of failing to scrutinize Citibank's claim for attorneys' fees under the standards developed in and applicable to fee awards under federal fee-shifting statutes. This argument is specious for a number of reasons.

First, petitioners are contractually obligated to pay Citibank's attorneys' fees in this case. Since no federal fee-shifting statute is involved, Citibank's entitlement to attorneys' fees is simply a matter of interpretation of a contract governed by New York law. Therefore, none of the cases relied upon by petitioners controls.[24]

Second, the district court's approach was correct. The court implied a reasonableness standard into the contract and then enforced the contract as so modified. App. at 20a-21a, 35a-36a (relying upon *United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, 834 F.2d 1533, 1547-48 (10th Cir. 1987)).[25] The court then looked to the federal statutory cases to inform its application of the reasonableness standard and

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ruled on every category of fees and expenses that petitioners challenged. App. at 36a; *id.* at 9a-20a.[26] The factors applied were the very ones upon which New York courts rely in evaluating contractual awards of attorneys fees.[27] The court's analysis was all the more appropriate in view of the fact that petitioners' counsel had specifically conceded that Citibank's counsel's hourly rates were reasonable. App. at 8a.[28]

Finally, the district court's inquiry in passing on the reasonableness of requested attorneys' fees is essentially factual.[29] In this case, the district court's decision was upheld by the court of appeals. As this Court has repeatedly stated, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and

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[26] The court's final rulings on the various categories are reflected in its judgment. *See* Pet. at 7a.

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[28] Petitioners argue in section II of the Petition that fees should not have been allowed with respect to Citibank's defense against petitioners' counterclaims. Petitioners' counterclaims, however, were based on the same factual allegations as their affirmative defenses. *See* App. at 5a. Thus, Citibank's attorneys' fees incurred defending against the counterclaims were inseparable from those incurred pursuing the main claim. The district court rejected petitioners' assertion that work attributable to the breach of good faith counterclaim was not part of enforcement of the Guaranty. App. at 10a. Moreover, petitioners' counsel, Joseph F. Manson III, expressly conceded before the district court that the lender liability claims were properly "construed by this Court as part of enforcement." App. at 9a.

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exceptional showing of error."[30] Petitioners can show no such "obvious and exceptional" error here.

In sum, the lower courts' conduct of these proceedings was entirely proper and presents no occasion for the exercise of this Court's power of supervision.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CALVIN H. COBB, JR.
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April 25, 1990

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[30] *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (citations omitted); *accord, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

N. A. CITIBANK,

Plaintiff,

vs

BRUNO FIGLIUZZI, *et al.*,

Defendant.

Friday, October 9, 1987

Alexandria, Virginia

Transcript of Plaintiff's Motion to Strike Defendant's Demand for Jury Trial in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

For the Plaintiff:

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Of: MURPHY, MCGETTIGAN & WEST
921 King Street
Alexandria, Virginia 22314

[2] *For the Defendant*:

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Arlington, Virginia 22209

ROBERT H. KOEHLER, Esquire
Of: PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 22036

* * * *

[15] THE COURT: Under the Leasing Service case, of course, the waiver is valid waiver, but the burden is on the party who seeks to enforce it to show that the waiver was voluntary and informed. I think on this record it was voluntary and informed. This is a man with substantial business experience. He was represented I find at the closing and the document was obviously reviewed since it was changed at closing. The provision for jury waiver is not buried but is in a very important part of the guarantee, namely the part that describes the remedies of the bank in the event of default. If he chose not to look at it, I don't think that he can close his eyes and then say that his execution of the waiver was involuntary. Under these circumstances, I find that his waiver was voluntary and informed, and on that basis, the plaintiff's motion to strike the defendant's jury demand will be granted. I will prepare the order.

Court will stand in recess until 2 o'clock.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

N. A. CITIBANK,

vs *Plaintiff,*

BRUNO FIGLIUZZI, *et al.*,

_____ *Defendant.*

Friday, October 23, 1987
Alexandria, Virginia

Transcript of motions proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

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* * * *

[39] THE COURT: I think the plaintiff is entitled to summary judgment on its claim, and on not only on its original claim, but on its claim for dismissal of the counterclaim, and affirmative defenses. The remaining counterclaims are Count V, a breach of fiduciary duty, Count VI, tortious interference with contract, Count VII, breach of implied duty under the transaction, bad faith; and Count VIII, the unjust enrichment, the basis of which is this merger argument, between the letter of credit and the note.

I don't think that any of the alleged activities which we accept for purposes of this argument by the bank constitute a breach of fiduciary duty. First of all, I don't think there was any fiudciary duty owed by the bank to the [40] Figliuzzis under the circumstances in this case. The acquisition of the note obviously from Madison in March of 1985, obviously created no fiduciary duty; and the acquisition of the letter of credit, while it gave the bank two hats, did not in my view create a fiduciary duty nor was their activity thereafter any breach or failure to act in good faith, which is of course Count VII.

It seems to me that the bank did no more than under the circumstances it was entitled to do. The type of activity, the pressure to sell the business, its activity with regard to failure to consent or failure to consent except on certain conditions to the contract with Driggs, does not amount to any breach of implied duty of good faith.

The bank, as it was entitled to do, was looking out for the bank; and as far as I can see, it did no more than it was entitled to do, both under the bad faith allegations and the tortious interference with contract.

The withholding of the consent or the withholding of the consent except on an agreement to collateralize under certain conditions or the refusal to transmit the letter of credit to the proposed acquiring bank was neither bad faith, a breach of fiduciary duty nor tortious inter-

ference with the Driggs contract; so I think Counts V, VI and VIII must go out.

The merger question, it seems to me, the argument [41] made by the defendants is a hypertechnical one and ignores the reality of the economics of this transaction. The risk was divided into whatever was the interest rate on the note, plus a point and a half on the letter of credit. That risk did not decrease when Citibank acquired the note; and it would be unrealistic to say that an acquiring bank should accept the lesser risk payment, that is the note interest only and not the letter of credit point and a half; and I don't think there is any merger. They are separate transactions, and the acquiring of the letter of credit by the issuer of the letter of credit does not under these circumstances warrant any merger.

So the motion to dismiss or for summary judgment on the counterclaim is granted.

The only affirmative defense that might not be included in that ruling would be 9 and 14. I think the answer to those is the bankruptcy of the principal debtor under the note and LCS.

The counterclaims will be dismissed. Summary judgment will be awarded to the plaintiff on its claim on liability. I cannot on this record ascertain the exact amount due. I am perfectly willing to resolve that on the submissions of the parties if you think that can be done. The case is set for trial, is it——

MR. McGETTIGAN: It's set for trial November 2nd, [42] Your Honor.

THE COURT: I'll leave it on that date for the issue of damages unless counsel can get together. It seems to me that the differences, while $200,000 is not an amount to be sneezed at, it's a mathematical computation, I would think that counsel should be able to resolve.

MR. McGETTIGAN: We'll furnish counsel with all the backup and advise the Court.

THE COURT: If you cannot, it's still on the docket for November 2nd.

MR. McGETTIGAN: 2nd.

THE COURT: There has been a submission for attorney's fees. I don't think that the defendants have had an opportunity to respond to that.

MR. McGETTIGAN: That's correct.

THE COURT: That's something I would not submit. It's non jury, so you can do it all at one time. I do not normally hear oral argument or take evidence on attorney fee submissions, but the defendants have had no opportunity to respond to that. And perhaps you would want to before trial.

MR. KOEHLER: Yes, sir.

THE COURT: I will prepare the order on the liability issue.

We'll take a short recess and then we'll resume the civil docket.

(Whereupon, at 11:30 a.m., a short recess was taken.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1432-A

CITIBANK, N.A.,
Plaintiff

vs.

BRUNO FIGLIUZZI, *et al.*,
Defendant

MOTIONS

Monday, January 30, 1989
Courtroom 5
Alexandria Virginia

BEFORE:

THE HONORABLE T.S. ELLIS, III Presiding
United States District Court Judge

[53]

* * * *

MR. MANSON: Mr. Cobb was referring to the hourly rates. I had no problem agreeing that the hourly rates for the firm such as Steptoe & Johnson and Sherman & Sterling are reasonable, even in this area. We disagree to the extent of the numbers of attorneys, of course, participating at the same time on the same types of cases, and the overlapping of law firms doing the same types of things. That is the basic disagreement there.

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MR. MANSON: I'm sorry, Your Honor. I believe that is the only Counterclaim that we contend was not of the enforcement—

THE COURT: Which specific counterclaim is it, now, the breach of good faith?

MR. MANSON: Yes. It was the breach of good faith, and I could look that up in a second. I don't have that Counterclaim right in front of me. And the failure to settle was the other issue.

THE COURT: I do recall your arguing that.

What was the gravamen of that counterclaim?

MR. MANSON: That LCS Homes had found a purchaser for the plant. There was a meeting with Citibank officials wherein Citibank had agreed to—enumerated certain aspects of the agreement to be fulfilled to permit John Driggs to assume the IRB note.

And that Counterclaim asserted that they failed to approve John Driggs, that they breached the agreement that had been reached on February 10th, for whatever reason, but that is not part part of the [76] enforcement cost and that was not tied to the affirmative defenses.

The counterclaims and the lender liability, I believe, are fairly tied to the affirmative defenses and may be construed by this Court as part of the enforcement.

* * * *

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* * * *

THE COURT: * * * *

With respect to the bankruptcy proceedings, the Court will allow the fees relating to the section 341 meeting. Review of the filings and activities in connection with attempts to lift the stay or oppose the stay, Court is not persuaded that general activities in the LCS bankruptcy are activities that are related to enforcement of guarantee, rights section 7.02 in the guarantee provides.

The Court rejects the argument based on [99] failure to settle. It also rejects the argument relating to the counterclaim of the breach of good faith, holding that those costs can be included.

With respect to the overlapping of time, the Court is only going to decide what was placed before it in terms of the Defendants' arguments. It is not going to review each and every time record and consider whether in each and every instance there is overlapping of time.

With respect to the summary judgment argument, however, six lawyers is too many. The three, Mr. McGettigan and two others would have been adequate. I beg your pardon. Four. Mr. McGettigan as local counsel, who argued the matter, two Steptoe & Johnson lawyers, and the principal lawyer for Sherman & Sterling, whoever that might be.

There is a division of responsibility between Sherman & Sterling and Steptoe, and the issues assigned to both Sherman and Steptoe were in issue that day. I'm sorry. I did say three lawyers. It should be, Mr. McGettigan, one from Steptoe & Johnson, presumably Mr. Cobb, and the lead lawyer from Sherman [100] & Sterling, three lawyers.

Next, the Defendant attacks several days leading up to the summary judgment motion because there appear to be from the Defendants' perspective a lot of time billed and telephone calls that the Defendant alleges in a fairly vague way is excessive or overlapping time. The Court rejects that argument. The Plaintiffs have satisfied their burden by submitting the materials which appear on their face to be not unreasonable in preparing for summary judgment motion, and Defendants have not persuaded the Court that that is incorrect.

The same is true with the matters related on page 41, which the Court has reviewed.

And again, with respect to page 42, the same is true.

Now, with respect to the expense and 43, down to

where the expense items appear, the Court will disallow restaurant expenses. And the time spent, while I've had any number of business dinners myself at restaurants where we discussed case and case preparation, I'm not inclined to bless that as a means [101] of passing costs on to a losing party or to a party bound by contract because they are notoriously inefficient, and it is my experience that that is not a work context. And I think on that, the Plaintiff has not carried adequately its burden.

So to be specific, the actual amount of the restaurant bill is disallowed. And also disallowed is time alleged to have been—time billed allegedly working at such dinners.

Now, I except from that dinners or meals that are brought in any you remain in the conference room working, as opposed to going out to the Four Seasons or something of that story. I take is nobody did anything quite that extreme.

Now, there are the two other matters remaining on enforcement expenses. Three matters. One is the experts, one is the amount of time devoted to the preparation of this claim, and the third is, we didn't say anything overall about Driggs.

With respect to the time spent to prepare this claim, the Court allows those. That is well established. The authority cited by the Defendants to [102] the contrary did not ultimately prove persuasive. The contract clearly contemplates that the Plaintiff is going to have to make such a claim, and the time spent in putting it together is certainly contemplated. It should have been in the contemplation of the parties, and it was, this Court rules; and therefore, is allowable.

Second, with respect to the experts, we did not have argument with respect to the experts, so I will hear you briefly on that, Mr. Cobb. I didn't give you an opportunity to address experts.

MR. COBB: Very briefly, Your Honor, the other side designated three experts in preparation for trial, Citibank had to do so also.

THE COURT: On what subject?

MR. COBB: One was real estate appraisal, accounting; one was a developer, real estate developer, in the categories as I recall that have been designated by the other side as witnesses for their trial.

We respectfully submit that it was a necessary cost because if we had gone in without [103] expert witnesses and the other side—

THE COURT: The Wheeler decision, you would argue, is distinguishable because that considers whether certain expert witnesses are part of attorneys' fees and say that is not at all assumpsit here; assumpsit here is what is a recovery cost?

MR. COBB: It is all enforcement cost, we respectfully submit.

THE COURT: On the Driggs matter, you've argued that—You've already argued that point.

MR. COBB: Yes, sir.

THE COURT: Mr. Manson, do you have anything different to add to the experts matter other than the Wheeler case?

MR. MANSON: No, Your Honor.

And with respect to Driggs, we disagree that the facts were so interwoven. Of course, they were separate lawsuits, separate issues. It was tried in the United States Bankruptcy Court and decisions are still pending there and should not be allowed.

THE COURT: Do you have any other incidents other than the three-day monitoring of the trial—

[104] MR. MANSON: And the depositions in New York, I believe, in the month of May.

THE COURT: Were those depositions taken in connection with Driggs or taken in connection with this case?

MR. MANSON: Driggs only.

THE COURT: Were they used in this case at all?

MR. MANSON: No, sir. There were subsequent depositions in July, I believe it was, or August, that were joint depositions for this case and the Driggs case, and we have absolutely no problem with that.

THE COURT: These three that you are referring to anti-dated these?

MR. MANSON: Yes.

THE COURT: You disagree with that factual statement, Mr. Cobb?

MR. COBB: I accept Mr. Manson's statement of it. I think it squares with our recollection.

THE COURT: The Court accepts the Plaintiffs, but based on what is before it, the [105] representation that it is time devoted to the Driggs case, particularly close to summary judgment, was inextricably intertwined with this and used in this case, but it denies any fees relating to the three days of monitoring of the Driggs trial and to the three depositions that anti-dated the depositions that were jointly taken.

Is there any other issue on fees and expenses that needs to be resolved?

MR. MANSON: Those depositions that you just discussed, that includes the preparation time?

THE COURT: Absolutely.

MR. COBB: Your Honor, just for clarification, the depositions that are being excluded are the initial depositions?

THE COURT: The Driggs depositions that I understood were taken before you agree to take the depositions jointly, some of which as I understand, included the same witnesses.

MR. COBB: That's right, Your Honor.

THE COURT: All right. And yes, it includes the preparation time. And I'm sure there [106] won't be any dispute about what is preparation time. That concludes all of the matters under fees and expenses. Is that correct?

MR. MANSON: Well, Your Honor, yes and no. As we had stated in here, generally, there was other overtime, including dinners and cab fares.

THE COURT: I excluded the dinners. I'm not going to exclude the overtime.

MR. MANSON: Your Honor, of the $4,965, we don't know how much was overtime and how much was dinners.

THE COURT: Mr. Cobb is going to have give you all that.

You are going to be able to produce that, aren't you, Mr. Cobb?

MR. COBB: Yes.

MR. MANSON: Also the business meals for $1,744.

THE COURT: The what?

MR. MANSON: The business meals that they have listed separately.

THE COURT: We're not going to include [107] dinners or meals in this recovery.

Is that it, Mr. Manson?

MR. MANSON: If I may, Your Honor, there is the travel, $3,885.97, U.S. There is travel local from Sherman & Sterling, which means New York, for $165.

Stationery and supplies, postage and couriers, and Xeroxing for almost $40,000, that I would submit the Xeroxing could only be recoverable to the extent that they were used in court.

Where is the Xeroxing?

MR. MANSON: That would be exhibit three to the—

THE COURT: I asked you to write all these things down and put these topics down on a sheet of paper so I could go over them.

MR. MANSON: I understood that, Your Honor. That is why I asked for some guidance with respect to the attorneys' fees issue that I was seeking.

THE COURT: Where is this Xeroxing?

MR. MANSON: It is the exhibit three to Sherman & Sterling, that would be the Defendants [108] exhibit book, I guess that would be volume number two. I tell

you what I'm—Where is it? These are the last items, right, under fees and expenses?

MR. MANSON: Yes, Your Honor.

THE COURT: Tell me where it is.

MR. MANSON: Exhibit B.

THE COURT: Exhibit B.

MR. MANSON: And under exhibit B would be exhibit three in the Defendant's volume.

THE COURT: Exhibit three?

MR. MANSON: Yes, that is the designation, Your Honor.

THE COURT: I have exhibit two. All right. Exhibit three. All right. And specifically you challenge the local travel, the U.S. travel?

MR. MANSON: Yes, sir.

THE COURT: We've already talked about dinners.

MR. MANSON: Yes, sir.

THE COURT: And the Xeroxing?

MR. MANSON: The Xeroxing, the word processing, and information services for $2,278.69. [109] And proofreaders, $2,818.

Court reporting fees I have no problem with, and $144 in miscellaneous I don't have a problem with. The stationery and supplies for $365 troubles me, as well as the postage and courier for $671.36.

THE COURT: Why do they trouble you?

MR. MANSON: To the extent that the postage and couriers were utilized to have documents forwarded to the court or to opposing counsel, I would have a problem with it, but couriers in between offices, between Sherman & Sterling and Steptoe & Johnson, overnight delivery, that sort of thing, I don't believe are properly enforceable costs.

THE COURT: All right.

Mr. Cobb, let me hear briefly from you on some of these issues. Travel, local, is cabs in New York?

MR. COBB: Your Honor, this is a Sherman & Sterling thing. Maybe Mr. Mark would want to address these?

MR. MARK: Without pretending to know what all of them are, I would imagine that the travel local [110] is mostly cabs to and from the airport in preparation for travel to Washington. The travel U.S. would have been travel back and forth between New York and Washington.

THE COURT: Am I right that the average shuttle fare from Washington to New York is about $80?

MR. MARK: Now it is $99. I can't remember off-hand what it was.

THE COURT: So if we assume that it is $100, what we're talking about here is 300—

MR. MARK: About 38, 39 trips.

THE COURT: 39 trips, roughly 40 trips back and forth.

MR. MARK: That is what it comes out to, yes.

THE COURT: Over what time period?

MR. MARK: Mostly would have been in September, October of 1987. That was a time that would have included trips down to Washington to take depositions, would have included trips down to Washington to review documents at the LCS offices. It would, of course, include coming to court. I think [111] there are a couple of court appearances during that time period as well. There may be other things, as well, but that is all I can think of right now as to what is in that category.

THE COURT: All right. How many court appearances were there?

MR. MARK: I know there were two hearings in October. That is all that I—those are the only ones that anybody from Sherman & Sterling attended.

THE COURT: There were three here in January. Now, this is the third one. So that would be a total of five hearings in this matter here in Alexandria?

MR. MARK: That's correct.

THE COURT: All right. Now, $40,000 seems a bit high. Does that include all of the Xeroxing for Driggs and everything else?

MR. MARK: Well, it included Xeroxing. One reason for Xeroxing costs in this case is there were a lot of documents that were produced. I don't pretend to recall the exact number, but there were a very large number of documents produced by LCS, as well as [112] a very large number produced by Citibank. All those documents needed to be Xeroxed.

THE COURT: What was the charge per page?

MR. MARK: Excuse me?

THE COURT: What was the charge per page?

MR. MARK: I do not know off the top of my head what our internal charge per page is.

THE COURT: What is the word processing?

MR. MARK: That would have included documents that were being created and worked on after-hours, where we had people come in and prepare and edit documents.

THE COURT: How about proofreaders?

MR. MARK: That would be similar charge for people who would have proofread those documents on overtime.

THE COURT: What are information services?

MR. MARK: I'm not sure. I think what this is, the internal accounting categorizing changed during this time period, so I think information services would in effect be the same thing as word processing at a different time period due to simply an [113] internal firm change in the way we code things.

THE COURT: Thank you.

Mr. Manson, does that complete the list that you are raising before the Court on enforcement costs?

MR. MANSON: With respect to the expenses, Your Honor, yes.

THE COURT: And the attorneys' fees matters?

MR. MANSON: Yes, Your Honor. I would just like to point out that in Citibank's trial brief they stated that there were no undue time pressures with respect to this matter. One of the 12 items that the Court needs to take a look at, and I would submit that there would

be no need for overtime, secretarial overtime, word processing overtime, nor proofreaders.

They assert now that there was work done on weekends and evening, this had to get done. But in the brief they say there was no undue time pressures.

I would respectfully submit that the Court deny all overtime charges.

MR. COBB: One other thing, Your Honor. [114] Undue time pressures, as Your Honor well knows, by the time you get ready to actually appear in court, the pressures develop, and that is not out of the ordinary course.

Has Your Honor ruled on experts yet?

THE COURT: I'm going to right now.

The Court is going to allow the experts. I'm not persuaded by the authority cited by the Defendant. There is material before the Court which indicates that these experts were experts, as I understand, retained in connection with the defense of the counterclaims in this lawsuit, and the assertion of the claim.

That is correct, isn't it, Mr. Cobb?

MR. COBB: That's right, Your Honor.

THE COURT: I will allow those.

Now, let's go down this list.

First, with respect to the U.S. travel, 38 to 40 trips back and forth is in the Court's view excessive. Clearly at least ten trips would have been necessary to come to hearings by themselves. There may also have been depositions. Therefore, the Court [115] considers reasonable, since I don't have from the Defendant any specific attack after having had these figures and having had them asserted to be reasonable by Citibank. Nonetheless, the Court believes that no more than 20 trips would be justified under the circumstance. Even that is generous to the Plaintiff, in view of the fact that it assumes that it was necessary to have both law firms on this matter.

All right. I've already disallowed dinners. And if these are cabs used by people to go home after dinner, I'll disallow that as well. In fact, I can't think offhand

of any cab fare that I would allow. I will disallow cab fares.

Stationery and supplies, I assume that is stationery to write letters. It is not spelled correctly, but I assume that is what is sought, and the Court allows that. That dosen't appear on its face to be unreasonable, nor does the postage and courier. But the Multilith and Xerox is very high. There is no evidence before the Court on the amount per page that that would amount to, but that would be in effect 390,000 pages at ten—or 400,000 pages at [116] ten cents a page, which I think is probably somewhere in the right range. And the Court finds that to be high. There is also no indication of how many of these pages are documents needed to pursue the claims in this case, how many of them are just internal documents of Citibank, and the Court is faced with, in essence, a figure that it considers to be just flatly too high, but no real basis on the part of the Defendant to give anything other than an arbitrary basis for cutting it.

Accordingly, the Court allows $25,000, and admits that it is purely arbitrary based on failure of the parties to give it any other basis than that.

Based on what was recommended to the Court on word processing and information services, and proofreaders, the court disallows proofreaders, disallows the expense of a proofreader and disallows the expense of word processing; and allows information services to the extent that it is Lexus Research. If it is not Lexus Research, if it is ladies working late at night on word processors. That is disallowed.

Business meals are also disallowed.

[117] All right. Does that cover the costs?

MR. MANSON: Yes, Your Honor. If I just may for the record. I would just like to note that the schedule of order did preclude further discovery, and I was informed that except for updating the numbers, that Citibank would resist any attempt by me to open up dis-

covery. I don't want the Court to have the opinion that we were lax in trying to get these numbers resolved.

THE COURT: When you come to trial, you better come prepared to try the case. Mr. Cobb didn't put on Mr. Grady, and I have already considered that he probably should have anticipated that, and there is no question in the Court's mind but that you should have antiicpated. Indeed, some of the cuts that I have made are very generous from the point of view of the Defendant in view of the lack of proof.

I'm going to take a luncheon recess and come back at 2:00 o'clock and give you my findings of fact and conclusions of law in the case. It may not be possible for you to put together figures based on the rulings that I've given you today, and I accept [118] that. If it is, I would like to have them. I would like to have counsel reach agreement on it. For that, you'll have to trust each other's good faith. If you cannot, then I'll accept an affidavit. But I'm not going to have discovery, and it is not going to be disputed. In other words, we're not going to go on and have depositions about some of the matters that I've ruled on.

I would think the parties should be able to reach agreement on the amounts based on the guidance I've given in the rulings. I'll rule on all of the remainder of the matters, give my findings of fact and conclusions of law when we turn from luncheon recess, which will be 2:00 o'clock.

Court stands in recess until 2:00 o'clock.

(Whereupon, the hearing recessed at 1:00 o'clock p.m. and reconvened at 2:00 o'clock p.m.)

THE COURT: All right. Before I begin the findings of conclusions, I misspoke one one item prior to the luncheon recess. And the one item on which I [119] misspoke had to do with the Xeroxing expenses. I think I mentioned $25,000 . I meant to cut that in half, which was $20,000 not $25,000, as I recall the figures; conced-

ing, as I did, at the time that it was an arbitrary cut. But I gave the reasons why it had to be arbitrary and why in light of that I'll also give some findings, when I get to that particular point, based on the Western States Mechanical Contractors case, United States against Western States Mechanical Contractors case, which holds that in that context, as here, the purpose of the court is to make the parties whole and to give them the benefit of the bargain under the contract for attorneys' fees and recovery costs.

But even though that is the task of the parties, as I think Mr. Cobb forthrightly conceded, an element of the reasonableness has to be taken into account by the Court, and it even lists the factors typically cited under statutory cases as a guide for applying the reasonableness standard. I will come to that.

This matter is here for resolution of the [120] issue left open as a result of the summary judgment motion on October 23rd, which resulted in an order on that date, and the summary judgment was granted in favor of the Plaintiffs, Citibank, against the Defendants, Bruno Figliuzzi, et al.

The affirmative defenses were stricken. The Counterclaim was dismissed. And summary judgment was awarded in favor of the Plaintiff, Citibank, against Defendants Bruno and Joan Figliuzzi, jointly and severally, of the unpaid balance due on the note and the fees owed for the issuance of the letter of credit, plus enforcement costs, including attorneys' fees.

The issue of damages shall be tried on November 2, 1987, unless the parties in the meantime can agree on the damages. If the parties cannot agree on those damages, however, on the morning of November 2, 1987, or perhaps the day prior, the difference is immaterial to the issues before this Court.

The Figliuzzis filed for bankruptcy and this matter was thereafter stayed and did not come back for hearing until January 3, 1989, at which time [121] this Court

heard testimony and argument by the parties, and again heard argument on Friday, January 27th, and again today on Monday, January 30th.

The matter arose out of a transaction that began in December, 1983, with the execution of a number of documents in connection with an Internal Revenue bond transaction.

On that date, the parties to this lawsuit plus others, Madison National Bank and LCS Homes and the Industrial Development Authority of Stafford County, executed a number of documents as part of the transaction.

In essence, the transaction involved conveying to the Stafford County Industrial Development Authority two parcels of land in Stafford County, and the Authority issued its industrial development note. And then the Authority, Madison and LCS executed several other documents on that same date in December of '83, under which the bank, Madison, purchased the note and LCS assumed the obligation to pay the note—that is, to repay the note—and the Authority then placed the two pieces of real property [122] conveyed to it by the Figliuzzis into trust to secure the obligation of LCS under the note. And the purpose was, and ultimately there was a plant built on this property, a manufacturing plant.

All this is by way of setting the stage, but these facts were in essence disposed of in connection or found in connection with the previous summary judgment.

In connection with the transaction, LCS and Citibank, the Plaintiff here, and LCS being a corporation, the principal of which was Mr. Figliuzzi, sole stockholder, LCS and Citibank executed a reimbursement agreement, which is a part of the record in this case. And pursuant to that, Citibank issued an irrevocable letter of credit in the amount of $6 million—I believe that was a maximum amount—in favor of Madison, and LCS was to agree to reimburse Citibank for all amounts drawn on the letter.

Now, the Figliuzzis, Bruno and Joan, executed a guarantee in favor of Citibank under which they agreed

to pay the obligations of LCS arising out of the Internal Revenue bond transaction should LCS [123] fail to pay them. That guarantee by its terms was absolute in section 2.04 of the guarantee.

It reads in pertinent part as follows: "The obligations of the guarantor hereunder shall be absolute and unconditionally respective of the availability, legality or enforceabilities of the provisions of the reimbursement agreement, the note, purchase agreement or any other related document. Any act or omission on the part of the banks or either of them, or any other event that might otherwise constitute a legal or equitable discharge of the surety or guarantor and shall not be subject to any defense, counterclaim, set-off or recoupment, abatement, re-reduction, or any other determination that the guarantors may have against the company or either of the banks. It being agreed that the obligations of the guarantors hereunder shall not be discharged except by payment or as otherwise expressly provided in this guarantee."

The guarantee also provided for the payment of expenses of the banks. The banks here, of course, included Citibank.

[124] "The guarantors shall pay any and all costs and expenses incurred by the banks and the agent in connection with the preparation, execution and closing of this guarantee and the enforcement and protection of the rights and interests of the banks hereunder. And under applicable law, including without limitation the fees and disbursements of Citibank's counsel and Madison's counsel," and they're named specifically in there.

There was also a note executed which is part of the record in this matter. Under the reimbursement agreement, LCS was obligated to pay Citibank a letter of credit fee equal to one and one-half percent per annum of the maximum in advance the portion of the letter of credit amount. Such payments were due on a quarterly basis and they were due in advance.

Back to the guarantee.

The guarantee also provided that under section 2.05 (D), which states in essence that Citibank could extend or modify the time or manner of LCS's performance under the note or could waive LCS's [125] performance under the note without effecting the guarantee or the obligations of the guarantors.

That was section 2.05(D).

Of course, the section 2.05(D) must be read also in conjunction with—there are many subsections of 2.05 and they all are read in connection with the last paragraph that begins, "All in such manner and upon such terms as the bank may deem proper"—which gives it the effect that I just read; namely, that Citibank may change the time or manner for the performance—"Or comply with any term, covenant or agreement of the company," that is LCS, "on its part to be performed or complied with under the reimbursement agreement."

"The note, purchase agreement or any other related document may be extended or modified or such performance or compliance may be waived all in such manner upon such terms as the banks may deem proper and without notice to or further ascent from the guarantors, and all without affecting this guarantee or the obligations of each guarantor hereunder."

There came a time when the note was [126] purchased by Citibank from Madison. And at that point in time somewhere not material to this particular issue, but some time in 1985, Citibank then became entitled to receive the principal and interest due under the note, and the obligations of the reimbursement agreement as well.

Now, LCS remained current on the note and the letter of credit fees until 1985.

In 1985, in May of 1985, they ceased to do so.

In April of '85 I believe there was a payment under the letter of credit fee, but that payment was demanded back by the Figliuzzis or—I beg your pardon. By LCS.

In any event, it made no further payments after April, 1985.

All parties are agreed that as of the 1st of May of—I may be wrong about the date. They were current up until '86, and up until May of '86. And all parties are agreed that as of May of 1986 there was an outstanding principal balance on the note of $5,811,303.32.
[127] LCS failed to make the May payment.

Five months later, approximately, in October of 1986, October 31st, Citibank accelerated the indebtedness as it was entitled to do, and demanded that the Figliuzzis honor the guarantee. And in doing so, they, of course, reserved their rights and remedies under the guarantee and the acceleration.

Only two days or so after that acceleration, LCS filed a Chapter 11 bankruptcy here in the Eastern District of Virginia. Citibank was scheduled as a secured creditor in the amount that was undisputed at that time of $5,811,303.32.

Approximately one month later, on December 5, 1986, this action was filed

And in this action against the guarantors the Plaintiff, Citibank, claimed the default rate of interest at the rate of prime plus two percent on the undisputed principal in addition to the outstanding letter of credit fees and the Citibank expenses of collection.

Citibank claims, and it is true that this would certainly advise and put the guarantors on [128] notice that Citibank intended to enforce the default rate of interest against.

Thereafter, the LCS bankruptcy matter and reorganization proceeding went ahead. LCS and one of the guarantors—may have been both. I don't know whether it was both. But at least one of the guarantors sought a section 1.05 injunction in order to preclude or to enjoin Citibank from pursuing its remedies against the Figliuzzis in their personal capacities under section 1.05, under the theory that the Figliuzzis were needed to continue to pursue the reorganization activities and maximize the chances of preserving the assets of LCS.

Of course, Citibank opposed that, and there was also a motion to disqualify filed by Citibank, because at the same time the same counsel represented LCS and the Figliuzzis. That motion was apparently never argued.

The counsel for LCS and Figliuzzis, anticipating that there might be conflict, voluntarily split the representation, and new counsel was obtained for either LCS or Figliuzzi.

[129] The section 1.05 request for an injunction succeeded with the Bankruptcy Court enjoining Citibank from proceeding on its claim in the District Court. And that occurred in January of 1987.

So we have the suit filed in December and the section 1.05 hearing following shortly thereafter, and the injunction issuing in January of '87.

In connection with that section 1.05 proceeding and other matters in the Bankruptcy Court, the matter came up of whether Citibank was adequately protected by virtue of LCS's post-Petition payments on a note. It appears that LCS had made payments on the note from November of 1986, and continued making them until June of 1987, some eight payments, all of the same amount, namely $45,076. Although, it is clear from the record that Citibank did not file a motion for adequate protection in the LCS bankruptcy, and it is also true that the Bankruptcy Court, so far as this Court can determine, did not enter an order requiring LCS to make adequate protection payments, but the Court finds, and I'm persuaded that the matter that [130] LCS was making these payments in essence as adequate protection played a role in the section 1.05 proceeding.

The eight payments that were made, as I indicated, were made at $45,076, of which $29,807.98 were designated by the debtor as principal and—No. I'm sorry. I don't have that amount here.

In any event, the payments totaled almost $400,000.

Thereafter, in February of 1987, the Figliuzzis filed a Counterclaim in this matter as well as an Answer in

which they raised a number of affirmative defenses and a number of causes of action, including tortious interference, breach of fiduciary duty and the like. These presented issues of lender's liability, and Citibank accordingly retained the firm of Sherman & Sterling to address these issues, while Steptoe & Johnson, together with local counsel, would focus on the issues of the guarantee and the bankruptcy matters.

The reasons stated to the Court for doing so are that Sherman & Sterling had had a long [131] association with the bank and also had experience in this particular area.

There was some discovery in connection with the Counterclaim because the section 1.05 injunction did not preclude litigation of the Counterclaim, so there was some discovery that was started, but it appears from the file that this was estopped also by the Bankruptcy Court in early 1987, in February.

There was a plan of reorganization for LCS filed in March of '87. Ultimately it was withdrawn. The section 1.05 injunction continued at the request of the Fizliuzzis and LCS. Citibank moved to have the 1.05 injunction lifted and it did not succeed.

Thereafter, in late April of 1987, LCS sold its real estate, its plant and its equipment, the property which, of course, was there to secure the creditor's, Citibank's, claim.

At or about this time, and continuing afterwards, the parties had discussed and had been in settlement negotiations. They did not come to fruition.

With respect to the eight payments, the [132] testimony in the case reflects that Citibank recorded those payments on its books as payments of principal and interest in the manner—What is the exhibit number again, please, of the April 30th letter?

MR. MANSON: Your Honor, I believe it was Defendant's exhibit D. There was an exhibit 44, there was a compilation of all of those letters.

THE COURT: It is not in D. What was the other one?

MR. MANSON: 43? I believe. And that would be the—I'm sorry. The Defendant's exhibit. That was the composite exhibit.

THE COURT: Clerk, do you have the other exhibit books there?

THE CLERK: No, sir.

MR. COBB: Your Honor, it is included in Defendants' composite exhibit number one, attached to their second supplemental brief.

THE COURT: Second supplemental brief?

MR. COBB: Yes, Your Honor. That may not be the only time it is included.

THE COURT: See if you can find it in [133] there. All right. I have it.

The eight payments, according to the testimony, were recorded on the books of Citibank as shown in a breakdown that is attached to a letter by John H. Grady, then an associate with Steptoe & Johnson, to Joseph Manson, who was then counsel to LCS.

There is substantial argument about the purpose of the letter. The Court ultimately concludes that that letter, in April of 1987, based on the record before it, was apparently written for the reason of a request for information in the context of the bankruptcy matter by Mr. Manson, then representing LCS in the bankruptcy, to help formulate a plan of reorganization. And Mr. Manson said as much in his argument. There may have been other purposes.

There has been an allegation and some reference in the testimony that it was also by way of settlement. But in any event, it is clear that it was made for a limited purpose. And that shows an allocation of principal and interest using interest at the nondefault rate. [134] In any event, following along chronologically: After the sale in April, Citibank received the proceeds from the sale in August, and provisionally applied the

amounts that it received, some $4,731,519.45 to principal on its books. The debtor in bankruptcy, then LCS, made no indication as to how it wished those payments to be applied.

There is another document in the record that is disputed as to its origin, which shows, purports to show that Citibank applied that amount to principal. The Court doesn't need to find whether that is Citibank's document or not. Citibank does not contest that it told Mr. Figliuzzi that it applied that amount to principal on its books.

I beg your pardon. I beg your pardon. It told LCS, according to the records, so far as the Court has, that not knowing the genuiness of this document, the document has a legend on it that it was provided by Steptoe & Johnson on August 7, 1987, to Mr. Bruno Figliuzzi. The Court does not know whether that statement is true or not, and there has been no testimony. What has been shown is that that certainly [135] was communicated to LCS, perhaps through Mr. Figliuzzi, but it was communicated in essence to the bankrupt debtor.

Now, a certain amount of these proceeds of the sale had to be set aside in escrow for a certain mechanic's lien, approximately $400,000. There was some dispute over whether the lienor was entitled to that protection. But in any event, the Bankruptcy Court in effect approved the escrow and it was maintained in escrow at that time.

Thereafter, given that there had been a sale of the property and the factory of LCS, it was clear there wouldn't be any effective reorganization of LCS involving those assets; and so Citibank moved to have the section 1.05 injunction lifted, and it succeeded in doing so.

There were efforts made to settle this action in the summer of 1987, and ultimately this matter was set for trial on November 2nd of '87. There was discovery and there was a summary judgment motion scheduled for October 23, 1987. Citibank proceeded to get ready

for a trial of the matter, as [136] well as for the motion for summary judgment.

The motion for summary judgment, of course, took place, as I indicated, on October 23, 1987. The court granted Citibank's motion in its entirety disposing of the liability questions, but not the damage issues, which are the subject of this proceeding.

It didn't go on to do so because on November 2nd, which had been the trial date, and was going to be used by the Court for disposition of the damage issues, the Figliuzzis filed their Joint Petition for Relief under Chapter 11. And of course, under the circumstances, this Court had to stay these proceedings.

The Bankruptcy Court denied Citibank's request for relief from this stay, the automatic stay that comes into play as soon as the Bankruptcy Petition is filed, to allow the Court to go ahead and liquidate the amount of the summary judgment. That was denied.

In 1988, in February, Citibank filed proof of claim in the Figliuzzi bankruptcy matter, and even [137] in that proof of claim it indicated that it was seeking interest at the rate of prime plus two percent. It also indicated in the proof of claim that the payments that had been received had been credited first against the shortfall in interest, which was substantial by then, and then if appropriate, against the principal balance. And that was stated with respect to all of the payments which by that time included the eight $45,000 payments, the amount received from the proceedings of some $4,300,000, and an additional $41,000 payment received in October of '87.

Later, the $400,000 that was held in escrow as a result of a mechanic's lien was received in May of 1988.

In any event, in June of '88, the Bankruptcy Court lifted the stay for the sole purpose of liquidating the claim.

There were efforts involved in moving this matter back and forth to the Bankruptcy Court because they filed a

Petition for removal, and ultimately the matter was remanded back here to this Court. The [138] matter was clearly hotly disputed at every turn by the Figliuzzis. I say that because the fees ultimately in this case are substantial, and that needs to be understood in the context of this having been a very hotly disputed matter in which the Figliuzzis in essence fought every battle and put up a fight at every turn.

As an example, I believe the record discloses that the original proof of claim submitted in the LCS bankruptcy was not disputed, but it was disputed in the Figliuzzi matter. There was no proof of claim—beg your pardon. There was no proof of claim in the LCS matter, but it was listed. It was nonetheless listed as a debt, and it was listed under the category of undisputed.

Of course, some of the matters disputed here today were not yet ripe in that instance, so they could not be disputed in the sense some of them are disputed today.

But nonetheless, the Court is absolutely convinced in terms of a hotly-disputed litigation, this one, during the period that it has been disputed, [139] takes a second place to none. There are other evidences of that in the time records that the Court has reviewed.

All right, in its ruling of October 23rd, this Court, with Judge Bryant sitting, ruled that the Figliuzzis were liable on the unpaid balance due on the note and the fees owed for the issuance of the letter of credit. As noted, LCS had defaulted on its obligations under the letter of credit in 1985, and as of July on its obligation under the note, as of May 11th, which was the date of default, May 11, 1986.

The note provides that upon acceleration, which occurred in October 31, 1986, the note would bear interest at prime rate in effect on the date of the default plus two percent from the date of default and full payment of this note.

That therefore under the note, Citibank was entitled to receive interest on the outstanding balance under the

note, and at that time, in May of 1986, it was $5,811,-303.32, at the rate of prime plus two percent, from May 11, 1986, to the date of payment. And they also became entitled under the [140] reimbursement agreement to receive penalty fees equal to five percent of the fee then due and owing. None of these payments have been made.

All right. Now, first, with respect to the $45,000 payments, the eight of them, the Court concludes that based on the record as a whole, that those payments were in the context of helping to formulate a plan of reorganization and were in the nature of providing adequate protection. They were recorded, by Citibank's admission, own admission, on Citibank's books and records in accordance with the original terms of the note.

Under the circumstances, the Court concludes that that is what was contemplated by the parties would be done at that time, and in that context—and indeed by the Bankruptcy Court, which certainly would not have permitted Citibank at that time to allocate all of that to interest.

The Defendants here argue that the April 30th letter setting forth the allocation, and the way in which the payments were allocated on the books operates to bind Citibank to an election which it [141] cannot now escape.

Court rejects that argument.

The Court concludes that the terms of the guarantee are clear and absolute, and that there is nothing in the nature of a waiver or of modification or an estoppel here, nor that they are bound under either Virginia or New York law to the allocation made on their books.

The Court having already indicated that this was not an allocation, this was made for a limited purpose, the letter was made for a limited purpose, and the allocation on the books was also done for reasons of conservative bookkeeping, but not in derogation of rights under the guarantee. And indeed, the Defendant's never gave anything up in terms of that.

The Defendants have the burden of proving both waiver and estoppel by clear, precise and unequivocal evidence, both under Virginia law and under New York law, and there is no such clear, precise and unequivocal evidence in this matter of any waiver or estoppel growing either out of the [142] allocation made on the books of the $45,000 payments, or the sale proceeds.

And that goes for both the allocation and Citibank's right to calculate interest at prime plus two percent, the default rate for the period from November, 1986, to September, 1987.

There is no claim of default rate of interest prior to November of '86; is that correct?

MR. COBB: Your Honor, the default rate is retroactive to May 11th.

THE COURT: May 11th. But there is no dispute about it? There is a dispute, isn't there, back to May? If there is a waiver, there is a complete waiver; is that the argument?

MR. MANSON: That's the argument, yes, sir.

THE COURT: All right. What the Court finds particularly persuasive are sections 2.04 and 2.05(D) of the guarantee, which make unmistakeably clear the absolute nature of the guarantee. And the Court is not persuaded that whatever Citbank did on its books and its letter from Mr. Grady dated April 30th, communicating a breakdown of a $45,000 payment [143] or the communication to LCS or Mr. Figliuzzi of how Citibank was putting the sale proceeds on its books, none of that amounts to a waiver of Citibank's rights under the guarantee, nor is there any estoppel.

There is no detrimental reliance that has been shown by the Defendants, except having filed an income tax return, and if more is alotted to interest, they can certainly get a tax refund.

But on the estoppel issue, there is no persuasive evidence that Citibank made any representations to the guarantors that it would not seek to collect interest at

the default rate. Rather, there is evidence from the proof of claim and through the lawsuit that is certainly intended to collect the default rate of interest. And although the Defendants argue that the guarantor's obligations shouldn't extend beyond the debtor's obligations—but that rule, of course, may be varied by contract as reflected in the Bruno decision.

And the Court concludes that the provisions of this guarantee do indeed make the guarantor's obligation also absolute.

[144] Now, accepting the figures—there is no contest as to thoses figures, assuming the rulings the Court has made, that after the Citibank received the amounts from the sale, the $4,371,000, if all of that is allocated first to outstanding interest and then to principal, it would leave a principal amount in 1987, in August of 1987, of $1,844,945.32. There were some other payments made in October of 1987, totaling $41,087.53. If that is allocated to the interest shortfall, which it was, and then the $400,494.81 held in escrow, when that is received, all of that, by the time of this hearing, that would leave a principal balance of $1,550,981.22.

Letter of credit fees totaling $234,881.07, and the interest calculated at prime plus two, the default rate of interest of $118,688.88.

I should have noted parenthetically, although it is obvious, that the major dispute here being the allocation of the various payments and sale proceeds, because there is no assertion by Citibank here that it seeks or is entitled to interest on interest; and therefore, the way in which these [145] payments are allocated is important.

And the essence of the Court's conclusion is that this is an absolute guarantee. The Figliuzzis here undertook to guarantee payment of the note unconditionally and absolutely, and in effect, this Court's rulings bind them to that undertaking.

And the Court, of course, as I already indicated has concluded that neither the communication about the allo-

cation of the $45,000 payment nor the sale proceeds allocation operate as a modification or as a waiver or as an estoppel, or any binding election by Citibank to impair its rights to proceed against the Defendants, both on the allocation point and also on the rate of interest point as prime plus two.

In reviewing this matter, the Court has been guided, of course, by the guarantee's provision indicating that it would be governing in accordance with the laws of the State of New York. And this being a diversity matter, under Flackson versus Stentor, the Court has applied the conflicts rules of this forum, and has therefore under the conflicts rules of this forum looked to the law of the State of [146] New York in construing the guarantee in conformance with the contractual provision.

We come now to the enforcement costs.

Under section 7.01 of the guarantee, Citibank is entitled to any and all costs and expenses incurred by it in connection with—paraphrasing—the enforcement and protection of its rights and interests under the guarantee.

So it fell to the Court to determine both with respect to attorneys' fees and expenses, what amount to permit. Court is persuaded that unlike a statutory matter such as Title VII or anti-trust, this case is guided by the principal that a fee petition should not be scrutinized for reasonableness, per se, as they are in those cases.

But rather in this case, the Court must engage in a review consistent with the purpose and language of the contract provision; the purpose being to make the non-breaching party whole. But in doing so, of course, the Court in effect has to read in a reasonableness provision. And it did so, and there is authority from the Tenth Circuit as cited by the [147] Plaintiff in this matter, the Western States Mechanical Contractors case, indicating that where contracting parties have agreed that a breaching party will be liable for attorneys' fees, the purpose of the award is to give the parties the benefit of

that bargain, and the Court's responsibility is to enforce that bargain.

However, it goes on to say clearly the trial court has discretion to adjust or even deny contractual award of fees if such an award would be inequitable or unreasonable. Or as I put it earlier, certainly there is a reasonableness provision that must be read into section 7.02. That, the Court finds, was in the contemplation of the parties.

In any event, the Western Contracting case goes on to say that "In considering whether a fee is reasonable or excessive, the Court need not wholly disregard the factors from the Federal cases awarding fees in the statutory context."

So by a circular fashion, the Court comes ultimately back to a number of those factors, including how difficult the questions were, the skill [148] required to handle the problem, the time and labor required, the lawyers' experience, ability and reputation, the customary fee charged by the bar for similar services, and the amount involved. It is perfectly appropriate in cases of this sort, and it was in the contemplation of the parties that lawyers would employ the kind of load-star methodology where you multiplied the hours reasonably spent by a reasonable hourly rate. That has been done and the fee, the fee claim has been submitted.

Now, prior to the luncheon recess I ruled on many of those. I believe I ruled on all of those matters, but did not come up with a liquidated amount. And I'm going to ask the parties how long you need to give the Court a liquidated amount so that I can enter an order in this matter? But before I do so, let me check one other matter.

If I didn't mention it, I should have: That the sale proceeds were applied by Citibank in accordance with the terms of the note; that is, pre-default terms of the note. That is, first, outstanding interest on the note, and then the [149] principal. And also the payments, a total of

41,000 and some-odd dollars in October of '87, were applied to the interest shortfall and the $400,494.37 received as having been held in escrow as a result of the mechanic's lien was applied first to interest and interest shortfall, and then to principal.

The Figliuzzis have never made any payments under the guarantee. And as the Court has already held, there was no waiver, no clear, precise and unequivocal evidence of a waiver in this matter, and there was no intentional relinquishment of a known right in this case by Citibank.

It also appears that in the case of the estoppel, which much be based on evidence of a representation, reliance and the change of position to detriment, the Court is not satisfied that any of that has occurred in this case, even if the Court accepts the Defendants' argument that the April 30th letter is a representation designed to be relied on in the way that the Defendants claim reliance. There was no reliance or change in position to detriment that the Court concludes is adequate to adjust fee estoppel in [150] this case.

There was also a claim that the default rate of interest should not be permitted as a penalty, because it would be in effect an assessment of back interest. The Court rejects that argument as well, as this is the enforceable inquisition of additional interest upon a debtor's default on a note, which is entirely permissible under Virginia law, which is the law that I believe governs the note.

Is that correct? The Virginia law does govern the notes?

MR. COBB: Yes, sir.

THE COURT: I should note with respect to some of the factors that I mentioned that this action was not a simple and straightforward action. It involved proceedings in at least two different courts, involved a number of areas of the law. It is not a simple matter. The Court did make some rulings where it indicated that counsel for the Plaintiff had too many lawyers present

at the summary judgment motion, but I don't mean to say by limiting the number of lawyers that it wasn't a complicated matter.

[151] All right. Mr. Cobb, how long would it take to supply the Court, after consultation with Mr. Manson, with a figure that accurately reflects the ruling of the Court? And rolled in that question is: Is there any reason why the rulings the Court has made would not permit the parties to liquidate or to come up with a specific figure for the principal, for the interest and also for the enforcement costs?

MR. COBB: Well, I believe Your Honor has already defined the principal and interest and letter of credit numbers.

As to the enforcement costs, there may be some shadow areas, since some interpretation we might have to make out of our time records.

THE COURT: I would suggest to you that you will probably lose close questions involved in that, and maybe that would guide you.

MR. COBB: All right, Your Honor. I think that we could—

THE COURT: What I don't want to do is turn this into a "What did you do on August the 31st," and based on time records, that sort of thing.

[152] MR. COBB: That is what I define as a close area. Because I will have to go back to those—we're prepared to give them numbers right now, Your Honor.

THE COURT: I have ruled on all of the expense matter, and I have ruled on the matters relating to overlapping time that were in the Defendants' brief.

Is there any matter that I've omitted that you know of?

MR. COBB: No, Your Honor.

THE COURT: Mr. Manson?

MR. MANSON: No, Your Honor.

THE COURT: Is there any reason why a figure cannot be derived from the Court's rulings?

MR. COBB: Your Honor, counsel never has had trouble getting along with each other. The problem arises when the client on one side won't give counsel authorities. Mr. Manson and I would have no difficulty whatever in reaching—

THE COURT: Your client has to give some, too, in this context.

[153] MR. COBB: Our client reposes confidence in counsel in these matters.

THE COURT: How long do you think it will take you to come up with a figure, based on the Court's rulings?

MR. MANSON: Mr. Cobb indicates that tomorrow afternoon he can have them to me and we can have that into the Court by Wednesday.

THE COURT: All right. Then, I would like to have something submitted by 5:00 o'clock—Let's see. What is the date Wednesday?

MR. MANSON: The 1st.

THE COURT: All right. By noon on the 1st of February so I can be sure to enter the Order on the 1st of February.

I want to thank counsel for their cooperation in the matter. The record should reflect that the matter was hotly disputed, even here. I think the parties had adequate opportunity to argue the matter, both in writing and orally, and both parties were vigorously and zealously represented.

As in all cases, somebody wins and somebody [154] loses, but I think in this case both parties are certainly ably represented.

All right. The Court will look for the submission to chambers, and file it with the Clerk as well. If you have a dispute about it, then whatever piece of paper you file should identify with precision what the dispute is, so

that I can rule on it just looking at that. And I want both counsel to sign it.

All right. Court stands in recess until tomorrow morning.

MR. COBB: Your Honor, on behalf of all counsel, we would like to express our appreciation for the speed and exactness with which Your Honor grabbed ahold.

THE COURT: It wasn't quite as speedy as I originally intended and wasn't quite as precise as I originally intended, because the parties argued a number of interesting issues.

The Court stands in recess until tomorrow morning.